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IN THE
Supreme Court of the United States

ARNOLD MAURICE BENGIS,
JEFFREY NOLL, and DAVID BENGIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. § 3663A, requires sentencing courts to impose restitution for any "victim" of any offense that is "an offense against property." The Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663, allows a sentencing court to impose restitution for any "victim" of any Title 18 offense. Both the MVRA and VWPA define "victim" as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including . . . any person directly harmed by the defendant's criminal conduct in the course of [a] scheme, conspiracy, or pattern." 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2).

In a decision that runs afoul of several lines of case law of this Court, the Second Circuit reversed four opinions of the District Court and awarded restitution to the Republic of South Africa on the grounds that (i) South Africa's legal right to forfeit overharvested lobster transformed Petitioners' United States crime into an "offense against property" and (ii) South Africa was "directly and proximately harmed" by Petitioners' offense under United States law—even after South Africa had forgone the opportunity to forfeit and sell lobster that it had seized from Petitioners, settled the South African legal proceedings, and released Petitioners from liability.

The questions presented are:

1. Whether the power of a government, in this case a foreign government, to seize the object or proceeds of an offense transforms the offense

into an "offense against property" requiring restitution under the MVRA.

2. Whether a foreign sovereign may be a "victim" for purposes of restitution where (a) the Dictionary Act, 1 U.S.C. § 1, and this Court's precedent presumptively exclude sovereigns from statutory uses of the term "person" and there is no indication that Congress intended a foreign sovereign to be a beneficiary of restitution; and (b) the defendants pled guilty to conspiracy to violate United States law, and any harm to the foreign sovereign was caused by unadjudicated foreign conduct.

PARTIES TO THE PROCEEDING

In addition to Petitioners, Grant Berman and Shaun Levy were co-defendants in the District Court proceedings below. Neither Berman nor Levy was a party in the Second Circuit and they are not parties before this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
I. Background	3
II. The Opinions Below	4
REASONS FOR GRANTING THE PETITION	8

Table of Contents

Page

I. The Second Circuit's Definition of "Offense Against Property" Disregards this Court's Offense-Classification Jurisprudence and Will Radically Transform the Administration of Criminal Justice by Expanding the Mandatory Restitution Remedy to Include any Offense that May Give Rise to Forfeiture 10

II. The Second Circuit's Conclusion that Foreign Sovereigns May be "Victims" Under the MVRA and VWPA and Recover Restitution for Harm Caused by Violations of Foreign Law Disregards the Presumption Against Extraterritoriality, the Penal Law Rule, and the Limits of Proximate Causation 19

CONCLUSION 32

TABLE OF APPENDICES

Page

APPENDIX A — Opinion of the United States Court of Appeals for the Second Circuit, Decided January 4, 2011 ..... 1a

APPENDIX B — Order of the United States District Court for the Southern District of New York, Dated September 12, 2007 ..... 19a

APPENDIX C — Report and Recommendation of the United States District Court for the Southern District of New York, Dated May 17, 2007..... 24a

APPENDIX D — Order of the United States District Court for the Southern District of New York, Dated January 29, 2007 ..... 47a

APPENDIX E — Report and Recommendation of the United States District Court for the Southern District of New York, Dated December 19, 2006 ..... 49a

APPENDIX F — Statutes Involved..... 81a

TABLE OF CITED AUTHORITIES

Page

CASES

Begay v. United States,
553 U.S. 137 (2008) 10, 11

Benz v. Compania Naviera Hidalgo, S.A.,
353 U.S. 138 (1957) 23

Bridge v. Phx. Bond & Indem. Co.,
553 U.S. 639 (2008) 27

Chambers v. United States,
555 U.S. 122, 129 S. Ct. 687 (2009) 10, 11, 14

Cleveland v. United States,
531 U.S. 12 (2000) 5, 16, 17

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 21

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 27

Foley Bros., Inc. v. Filardo,
336 U.S. 281 (1949) 23, 26, 28

Gonzalez v. Duenas-Alvarez,
549 U.S. 183 (2007) 12

Hemi Group, LLC v. City of New York,
-- U.S. --, 130 S. Ct. 983 (2010) 27

Cited Authorities

Page

Holmes v. Sec. Investor Prot. Corp.,
503 U.S. 258 (1992) 27

Howard Fire Ins. Co. v. Norwich & N.Y. Transp. Co.,
79 U.S. 194 (1870) 27

Hughey v. United States,
495 U.S. 411 (1990) 24

Leocal v. Ashcroft,
543 U.S. 1 (2004) 12

Morrison v. Nat'l Australia Bank Ltd.,
-- U.S. --, 130 S. Ct. 2869 (2010)..... 23

Nijhawan v. Holder,
-- U.S. --, 129 S. Ct. 2294 (2009) 10, 11, 14

Pasquantino v. United States,
544 U.S. 349 (2005) ..... *passim*

Scheidler v. Nat'l Org. for Women, Inc.,
537 U.S. 393 (2003) 12

Shepard v. United States,
544 U.S. 13 (2005) 13, 14

Small v. United States,
544 U.S. 385 (2005) 22, 25, 28

Page

Taylor v. United States,
495 U S. 575 (1990) 9, 10, 11, 14

United States v. Blake,
81 F.3d 498 (4th Cir. 1996) 30

United States v. Bonetti,
277 F.3d 441 (4th Cir. 2002) 12

United States v. Corey,
232 F.3d 1166 (9th Cir. 2000) 26

United States v. De La Fuente,
353 F.3d 766 (9th Cir. 2003) 12

United States v. Ekanem,
383 F.3d 40 (2d Cir. 2004) 20

United States v. Kones,
77 F.3d 66 (3d Cir. 1996) 30

United States v. Kurfess,
426 F.2d 1017 (7th Cir. 1970) 13

United States v. Riley,
143 F.3d 1289 (9th Cir. 1998) 30

United States v. Robinson,
147 F.3d 851 (9th Cir. 1998) 13

Page

United States v. United Mine Workers,
330 U.S. 258 (1947) 20

Vt. Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 20

Wisconsin v. Pelican Ins. Co. of New Orleans,
127 U.S. 265 (1888) 26

STATUTES

1 U.S.C. § 1 ..... 19, 20

16 U.S.C. § 1532(13) 23

16 U.S.C. § 3372 ..... 2, 3-4

18 U.S.C. § 16 12

18 U.S.C. § 371 ..... 2, 4

18 U.S.C. §§ 471-81 15-16

18 U.S.C. §§ 485-88 15-16

18 U.S.C. §§ 501-02 15-16

18 U.S.C. § 510 15-16

Cited Authorities

	Page
18 U.S.C. § 545	2, 13
18 U.S.C. § 842	15
18 U.S.C. § 922(g)(1)	25
18 U.S.C. § 981	14, 15
18 U.S.C. § 1028	16
18 U.S.C. § 1341	16
18 U.S.C. § 1343	16
18 U.S.C. §§ 1956-57	15
18 U.S.C. § 3231	3
18 U.S.C. § 3579	21
18 U.S.C. § 3663	*passim*
18 U.S.C. § 3663A	*passim*
18 U.S.C. § 3664	2, 20, 21
18 U.S.C. § 3731	7
22 U.S.C. § 6023(11)	23

Page

28 U.S.C. § 1254(1) 1

La. Rev. Stat. Ann. § 15:31(A) (2000) 17

La. Rev. Stat. Ann. §§ 27:301-324 (2000) 17

Marine Living Resources Act (Act No. 18 of 1998) (S. Afr.) 2, 29

MISCELLANEOUS

H.R. Rep. No. 101-681(I) (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472 30

H.R. Rep. No. 104-16 (1995) 23

S. Rep. No. 97-532 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515 21

S. Rep. No. 97-123 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748 13

S. Rep. No. 104-179 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924 ..... 18, 30

3 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2010) 12

Black's Law Dictionary (9th ed. 2009) 12

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit reversing the Orders of the United States District Court for the Southern District of New York denying the government's request for restitution (App. 1a-18a) is reported at 631 F.3d 33 (2d Cir. 2011). The report and recommendation advising the District Court to reject the government's request for restitution under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A ("MVRA") (App. 49a-80a) is unpublished. The District Court's Order denying the government's request for restitution under the MVRA (App. 47a-48a) is unpublished. The report and recommendation advising the District Court to reject the government's request for restitution under the Victim and Witness Protection Act, 18 U.S.C. § 3663 ("VWPA") (App. 24a-46a) is unpublished. The District Court's Order denying the government's request for restitution under the VWPA (App. 19a-23a) is unpublished.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit from which Petitioners seek review was issued on January 4, 2011. This petition was timely filed within 90 days of the issuance of the January 4, 2011 Order directing the District Court to enter an order of restitution in favor of South Africa. On March 3, 2011, the Second Circuit granted Petitioners' motion to stay its mandate through April 4, 2011, to permit Petitioners to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of sections 371, 545, 3663, 3663A, and 3664 of Title 18 of the United States Code, section 3372 of Title 16 of the United States Code, and the Marine Living Resources Act of the Republic of South Africa, are reprinted in the Appendix to this petition. App. 81a-96a.

STATEMENT OF THE CASE

This case, which has garnered international attention because of its groundbreaking nature, raises the significant question of whether a government's authority to seize the objects or proceeds of an offense automatically transforms the offense into an "offense against property" giving rise to mandatory restitution under the MVRA. The Second Circuit—in an opinion that greatly expands the restitution remedy—concluded that Petitioners' conspiracy to violate the Lacey Act, which criminalizes importation of fish or wildlife caught in violation of foreign law, and to smuggle lobster into the United States constitutes an "offense against property" because at the time the lobster was caught in violation of South African law, South Africa had a right to forfeit the lobster. This case also presents an important question implicating issues of comity: whether a foreign sovereign may be considered a "victim" under the restitution statutes. The Second Circuit held that a foreign sovereign may recover as a "victim" under the MVRA and VWPA, which are silent as to foreign sovereigns, despite the fact that any harm to the foreign sovereign resulted from foreign conduct in violation of foreign law, and was not "directly and proximately" caused by the United States offenses to which Petitioners pled guilty.

I. Background

Petitioners were market leaders in fishing and fish-processing and their work included harvesting lobster in South Africa and exporting it to the United States and elsewhere. Petitioner Arnold Bengis was the managing director and chairman of Hout Bay Fishing Industries (PTY) Ltd ("Hout Bay") in Cape Town, South Africa. Petitioners Jeffrey Noll and David Bengis worked in related businesses.

Beginning in 2001, the United States and South Africa collaborated in a joint investigation relating to fishing activities off the coast of South Africa and the importation of fish into the United States. In June 2001, South Africa seized a container of fish caught by Hout Bay. App. 50a-51a. Thereafter, Hout Bay and others were prosecuted in South Africa. Hout Bay pled guilty to violating South African regulations involving overharvesting and paid financial penalties of approximately $6 million, the largest criminal penalties ever paid in South Africa at that time, and agreed to forfeit fishing rights in South Africa. In exchange for the guilty pleas in South Africa, the South African government agreed to release Petitioners from liability. None of the Petitioners were charged with, or pled guilty to, any crimes in South Africa.

In August 2003, Petitioners were indicted in the United States. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. Petitioners pled guilty in 2004 to crimes related to the importation into the United States of lobster caught in violation of South African laws. Specifically, Arnold Bengis and Jeffrey Noll each pled guilty to three counts of violating the Lacey Act, 16 U.S.C.

§ 3372(a)(2)(A), and one count of conspiracy to violate the Lacey Act and to commit smuggling, in violation of 18 U.S.C. § 371. David Bengis pled guilty to one misdemeanor count of conspiracy to violate the Lacey Act, in violation of 18 U.S.C. § 371. Petitioners received harsh sentences: Arnold Bengis was sentenced to a 46-month term of imprisonment and two years of supervised release; Noll was sentenced to a 30-month term of imprisonment and two years of supervised release; and David Bengis was sentenced to a one-year term of imprisonment and one year of supervised release. Additionally, Petitioners forfeited $7.4 million to the United States.

Despite this background of stiff sentences and enormous payments by Petitioners in penalties and forfeiture in the United States and South Africa, as well as a release by the South African government, the United States government sought $100 million in restitution from Petitioners on behalf of South Africa. The parties have spent nearly seven years litigating the issue of restitution.

II. The Opinions Below

The District Court held that South Africa was not entitled to restitution from Petitioners. In support of this conclusion, the District Court found that Petitioners did not commit an offense against property and that South Africa was not directly and proximately harmed by the offenses to which Petitioners pled guilty. The Second Circuit reversed the District Court's Orders, concluding that South Africa was entitled to restitution because it had a property interest in the overharvested lobster and was directly and proximately harmed by Petitioners' criminal conduct.

1. In the District Court, the government argued that under the MVRA, Petitioners should be ordered to pay $100 million in restitution to South Africa (the government subsequently reduced this figure to $39.7 million). In support of this argument, the government noted that under the MVRA, a defendant must pay restitution for Title 18 "offenses against property," and contended that Petitioners' overfishing of lobster in South Africa constituted an offense against the property of the South African government.

The District Court rejected the government's argument because Petitioners' "actual taking of the fish from South African waters was not an offense against property against the Government's designated victim, South Africa, because under South African law, South Africa does not own the wildlife in its waters and therefore had none of its 'property' taken by [Petitioners]." *See* App. 69a-70a. The District Court further held that South Africa's authority to forfeit overfished lobster did "not transform [Petitioners'] acts of over-fishing into offenses against South Africa's property . . . [because] [i]t is illogical to say . . . that the government has a property interest in every object that may be the proceeds or instrumentality of a crime *prior* to that object being forfeited." *Id.* at 73a. The District Court noted that in this case, "the fish imported into the United States had never been ordered forfeited by the South African government in South African criminal (or other) proceedings." *Id.* Finally, relying upon this Court's decisions in *Pasquantino v. United States*, 544 U.S. 349 (2005), and *Cleveland v. United States*, 531 U.S. 12 (2000), the District Court found that Petitioners' Lacey Act violations and the violations of South African law were "pure regulatory violations"

that do not give rise to a property interest upon which restitution under the MVRA may be based. *See* App. 74a.

2. Having failed to obtain restitution under the MVRA, the government next sought over $41 million in restitution pursuant to the VWPA. The government identified two theories pursuant to which South Africa purportedly was directly and proximately harmed by Petitioners' conduct: (1) South Africa suffered a loss to its natural resources as a result of the overfishing; and (2) South Africa suffered a loss because it was unable to seize and sell the lobster that Hout Bay overfished.

The District Court rejected the government's contentions and concluded that "the overfishing of lobster [in South Africa] cannot be said to be 'directly related' to any of the required criminal conduct under the statutes to which [Petitioners] plead guilty[.]" *Id.* at 39a. Because Petitioners did not plead guilty to overfishing lobster in South Africa, but rather, pled guilty to illegally importing the lobster into the United States, the loss that South Africa purportedly suffered as a result of the overfishing was not directly and proximately caused by the conduct for which Petitioners pled guilty. Additionally, the District Court concluded that restitution was not appropriate because "the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under [the VWPA] . . . outweigh[ed] the need to provide restitution" to any victims. *Id.* at 21a-22a; *see also* 18 U.S.C. § 3663(a)(1)(B)(ii).

3. The government appealed the District Court's Orders denying the government's requests for restitution under the MVRA and the VWPA. On January 4, 2011, a panel of the United States Court of Appeals for the

Second Circuit, which had jurisdiction pursuant to 18 U.S.C. § 3731, issued a decision vacating and remanding the District Court's Orders denying the government's requests for restitution under the MVRA and VWPA. *See* App. 1a-18a. The Second Circuit held that South Africa is entitled to restitution under the MVRA because Petitioners' offenses of conviction constituted "offenses against property" and South Africa is a legally proper victim for purposes of restitution.

In reaching this conclusion, the Second Circuit relied on *Pasquantino v. United States*, 544 U.S. 349 (2005), where this Court held that Canada's entitlement to tax revenue on liquor smuggled into Canada constitutes a "property interest." The Second Circuit assumed that "[h]ad [Petitioners] not undertaken efforts to conceal their overharvesting, . . . those lobsters caught in excess of the legal limits would have been seized and sold by the government." App. 14a. Thus, the Second Circuit held that Petitioners deprived South Africa of revenue and committed an "offense against property."

The Second Circuit acknowledged that the conspiracy to which Petitioners pled guilty did not involve the illegal harvesting of lobsters, but nevertheless reasoned that "[b]y smuggling the lobsters out of South Africa knowing that they had been harvested unlawfully, defendants deprived the South African government of its right to seize and sell the poached lobsters." *Id.* at 15a. Thus, the Second Circuit held that Petitioners' "conduct facilitated the illegal harvesting of the lobsters," thereby directly and proximately harming the South African government, and as a result, South Africa was eligible to receive restitution. *See id.* at 15a-16a.

Finally, the Second Circuit rejected the District Court's finding that the complication and prolongation of the sentencing process resulting from fashioning a restitution order outweighed the need to provide restitution to any victims, and opined that "multiplying the number of poached lobsters by the corresponding market price" is the proper method for calculating restitution to compensate South Africa for the "loss" suffered due to its inability to seize and sell the overharvested lobster. *Id.* at 16a-17a. Accordingly, the Second Circuit vacated the District Court Orders and instructed the District Court "to calculate restitution and enter an order of restitution in favor of the Republic of South Africa." *Id.* at 18a.

REASONS FOR GRANTING THE PETITION

Left undisturbed, the Second Circuit's decision will transform sentencing in the federal system because it converts any Title 18 offense that gives rise to forfeiture into an "offense against property" requiring restitution under the MVRA. This result is inconsistent with Congress's intent in enacting the MVRA and essentially eliminates the distinction between discretionary and mandatory restitution. In the antithesis of judicial economy, sentencing courts applying the Second Circuit's interpretation will be forced to determine whether the specific facts underlying the conviction could have led to forfeiture, and whether the government would have resorted to forfeiture "but for" the defendant's conduct. Nothing in this Court's precedent or the legislative history of the MVRA countenances this approach. Indeed, the Second Circuit's reasoning and holding run contrary to this Court's jurisprudence concerning the categorical approach to interpreting Congress's classification of

crimes such as "offenses against property." This Court should grant the petition to clarify that in determining whether an offense constitutes an "offense against property" giving rise to restitution under the MVRA, sentencing courts should apply this Court's "categorical approach" in *Taylor v. United States* and its progeny.

Additionally, the Second Circuit's conclusion that a foreign sovereign may be a "person" entitled to restitution under the MVRA and VWPA, and may recover for harm caused by unadjudicated violations of foreign law, runs afoul of well-established principles of statutory construction concerning the meaning of "person," the penal law rule, and the statutory causation requirements of both the MVRA and VWPA. This holding inappropriately requires sentencing courts to examine alleged violations of foreign law, make findings concerning the economic impact that the supposed violations had on a foreign sovereign, and order restitution to compensate the sovereign. Nothing in the language of the MVRA or VWPA, their legislative histories, or this Court's jurisprudence supports such a result. Allowing foreign sovereigns to recover restitution for violations of foreign law will transform United States courts into havens for foreign governments that have been unwilling or unable to recover in their own judicial systems. The Court should grant this petition to address the important questions of whether a foreign sovereign may be a victim under the MVRA and VWPA, and whether harm caused to a foreign sovereign by violations of foreign law may give rise to restitution under the MVRA and VWPA, given the requirement that the harm be "directly and proximately" caused by an offense of conviction in the United States.

I. The Second Circuit's Definition of "Offense Against Property" Disregards this Court's Offense-Classification Jurisprudence and Will Radically Transform the Administration of Criminal Justice by Expanding the Mandatory Restitution Remedy to Include any Offense that May Give Rise to Forfeiture

1. This Court has explained that when a statute refers to a criminal offense generically, courts should determine whether a particular offense constitutes the generic offense by examining the statutory elements of the conviction. For example, in determining whether a defendant committed a "violent felony" under the Armed Career Criminal Act ("ACCA"), a sentencing court should "examine [the offense] in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008); *see also Taylor v. United States*, 495 U.S. 575, 598 (1990) (interpreting the term "burglary" as used in the ACCA to refer to "the generic sense in which the term is now used in the criminal codes of most States"). Although "[t]his categorical approach requires courts to choose the right category[,]" it "avoids the practical difficulty of trying to ascertain at sentencing, perhaps from a paper record mentioning only a guilty plea, whether the present defendant's prior crime, as committed on a particular occasion, did or did not involve violent behavior." *Chambers v. United States*, 555 U.S. 122, 129 S. Ct. 687, 690 (2009).

In *Nijhawan v. Holder*, -- U.S. --, 129 S. Ct. 2294 (2009), this Court provided guidance concerning the determination of whether a statute refers to an offense

"generically" or to an offender's specific acts. There, the Court held that "an offense . . . that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," as used in the alien removal statute, "does not refer to generic crimes but refers to specific circumstances . . . because there is no such generic crime[.]" *Id.* at 2300-01 (emphasis omitted). In these circumstances, a sentencing court must consider "the specific acts in which an offender engaged on a specific occasion." *Id.* at 2298.

The Second Circuit did not comport with this offense-classification jurisprudence in concluding that Petitioners' conviction was an "offense against property." The MVRA requires a sentencing court to impose restitution for any offense that is an "offense against property." 18 U.S.C. § 3663A(c)(1)(A)(ii). The statute classifies these offenses not by referring to the defendant's specific conduct, but by referring to the statutes in which the offenses are defined: the MVRA applies to an offense against property "under" Title 18. Like the ACCA, the MVRA does not refer to "specific acts" or "specific circumstances." *Nijhawan*, 129 S. Ct. at 2298, 2300-01. Thus, "read naturally," the MVRA applies to property offenses "as generally committed." *Chambers*, 129 S. Ct. at 690; *see also Taylor*, 495 U.S. at 600-02.

Because the MVRA refers to "generic" property offenses, this Court's jurisprudence requires that in determining whether a conviction constitutes an "offense against property," a sentencing court "look to the statute defining the offense[,]" not "the facts and circumstances underlying [the conviction]." *Nijhawan*, 129 S. Ct. at 2298-99; *see, e.g., Begay*, 553 U.S. at 141 (applying this "categorical approach" to determine whether conviction

constituted "violent felony" under the ACCA); *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007) (applying "categorical approach" to determine whether conviction was "theft offense" under alien removal statute); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004) (applying a categorical approach to determine whether an offense constituted a "crime of violence" under 18 U.S.C. § 16). Indeed, two other circuit courts have applied a categorical approach to determine whether a crime constituted a "crime of violence" requiring restitution under the same subsection of the MVRA. *See United States v. De La Fuente*, 353 F.3d 766, 770 (9th Cir. 2003); *United States v. Bonetti*, 277 F.3d 441, 452 (4th Cir. 2002).

A generic crime or offense against property is one "in which the perpetrator seeks to derive an unlawful benefit from—or do damage to—another's property." *Black's Law Dictionary* 430, 1187 (9th ed. 2009). The common law crimes and offenses against property included burglary, theft, arson, larceny, embezzlement, and receiving stolen property. *Id.*; *see also* 3 Wayne R. LaFave, *Substantive Criminal Law* §§ 19.1-21.3 (2d ed. 2010) (compiling list of crimes that are "offenses against property" including theft, robbery, extortion, burglary, and arson); *cf. Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003) ("Absent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common-law meaning.").

Petitioners did not commit a "generic" offense against property. The elements of Petitioners' Title 18 offense—conspiracy to violate the Lacey Act and to commit smuggling—do not require a defendant to derive an unlawful benefit from, or damage, the property of another.

Indeed, even the underlying statutes, the Lacey Act and 18 U.S.C. § 545, do not address property interests; they are designed to protect the environment and regulate the movement of goods into and within channels of American commerce, respectively. *See* S. Rep. No. 97-123, at 2 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1749 (the Lacey Act "ensure[s] that endangered species are not further threatened with extinction, and . . . afford[s] management of healthy wildlife populations for hunting and other recreational purposes"); *United States v. Robinson*, 147 F.3d 851, 854 (9th Cir. 1998) (purpose of section 545 is "'to supervise and regulate the inflow of imported goods'" (quoting *United States v. Kurfess*, 426 F.2d 1017, 1019 (7th Cir. 1970)).

The Second Circuit concluded otherwise by examining not only the conduct underlying Petitioners' Title 18 offenses, but also the forfeiture rights vesting in South Africa as a result of that conduct. Rather than analyze the statutory elements of Petitioners' offenses, the Second Circuit considered "whether South Africa has a property interest in the illegally harvested rock lobsters." App. 11a. But the fact that South Africa may have had a forfeiture interest in the lobster is irrelevant to whether conspiracy to violate the Lacey Act and to smuggle is an "offense against property" because that fact was not a "necessarily admitted element[]" of Petitioners' Title 18 offense. *Shepard v. United States*, 544 U.S. 13, 26 (2005). Petitioners admitted knowing that the lobster had been caught in violation of South African law (though not any particular South African law), but they did not admit, and were not required to admit, that importation of the lobster into the United States wrongfully affected the property rights of another.

As the lengthy restitution proceedings below demonstrate, the Second Circuit's approach would require sentencing courts to engage in protracted litigation concerning the facts and circumstances underlying a defendant's offense and—for any offense with a related forfeiture provision—the exact nature of the forfeiture rights arising from the offense. The "'practical difficulties and potential unfairness of [this] factual approach are daunting,'" *Id.* at 20 (quoting *Taylor*, 495 U.S. at 601), and it is contrary to this Court's instructions—reiterated in *Chambers* and *Nijhawan*—on interpreting statutes that refer to offenses generically.

2. By analyzing the fact-specific question of whether South Africa had a "property interest" in the lobster, rather than focusing on whether conspiracy to violate the Lacey Act and to smuggle is a "generic" offense against property, the Second Circuit concluded that Petitioners' conspiracy to violate the Lacey Act and to smuggle constituted an "offense against property" because "the moment a fisherman pulls an illegally harvested lobster out of the sea, a property right to seize that lobster is vested in the government of South Africa." App. 11a. This analysis and conclusion threatens to expand dramatically the scope of the MVRA—which was intended to provide restitution only for "certain" crimes, 18 U.S.C. § 3663A—by converting any crime with a related forfeiture provision into an "offense against property." Pursuant to the Second Circuit's holding, any offense that authorizes a government to effectuate a seizure constitutes an "offense against property" that gives rise to mandatory restitution. The implications of this conclusion are astounding because the civil forfeiture statute, 18 U.S.C. § 981, allows the government to seize and forfeit any property that is

involved in, derived from, or traceable to more than 30 separate offenses. *See* 18 U.S.C. § 981(a). Moreover, the civil forfeiture statute specifically provides that "[a]ll right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." *Id.* § 981(f). According to the Second Circuit, then, each and every offense that may give rise to civil forfeiture under section 981 constitutes an offense against property because at the moment the offense occurs, the government has a property interest in any property that was involved in, derived from, or traceable to that offense.

The danger of the Second Circuit's definition of "offense against property" is best underscored by example. Section 842 of Title 18 provides that it is unlawful for any person to, *inter alia*, import, manufacture, distribute, transport or receive explosive materials without a license. Section 981(a) and (f), in turn, provide that "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation" of section 842 is subject to forfeiture, and the government has full title to the property upon the commission of the act that constitutes a violation of section 842. Therefore, if an individual transports explosive materials without a license, those explosive materials or any proceeds from their sale are the property of the United States government. As such, the government has authority to sell or dispose of the explosive materials. Under the Second Circuit's reasoning, the government's forfeiture right transforms any violation of section 842 into an "offense against property." This analysis applies to all of the offenses identified in the civil forfeiture statute, including money laundering (18 U.S.C. §§ 1956-57), offenses involving counterfeiting (18 U.S.C.

§§ 471-81, 485-88, 501-02, 510), and identification document fraud (18 U.S.C. § 1028), abruptly transforming these offenses into "offenses against property" giving rise to mandatory restitution under the MVRA, notwithstanding the fact that they have never been so characterized by this or any other court, and there is no basis to believe that Congress intended to impose mandatory restitution for all of these offenses.

3. Having erroneously concluded that "the threshold question is whether South Africa has a property interest in the illegally harvested rock lobster," App. 11a, the Second Circuit determined that *Pasquantino v. United States*, 544 U.S. 349 (2005), and *Cleveland v. United States*, 531 U.S. 12 (2000), governed its analysis of whether Petitioners committed an "offense against property." In *Pasquantino* and *Cleveland*, this Court addressed the meaning of "property" within the mail and wire fraud statutes. In *Cleveland*, the Court concluded that a government licensing scheme is a regulatory interest, and does not constitute "property" for purposes of 18 U.S.C. § 1341. And in *Pasquantino*, the Court held that a sovereign's right to uncollected taxes is "property" for purposes of 18 U.S.C. § 1343.

But neither *Pasquantino* nor *Cleveland* considered the meaning of "offense against property" as used in the MVRA because there was no reason to do so in those cases: the mail and wire fraud statutes at issue in *Cleveland* and *Pasquantino* are, unquestionably, offenses against property because they penalize use of the mails or wires in connection with a "scheme or artifice to defraud, or for obtaining money or property." 18 U.S.C. §§ 1341, 1343. Thus, *Pasquantino* and *Cleveland* should not inform

the analysis of whether a particular offense constitutes an "offense against property" under the MVRA.

Indeed, by erroneously relying on *Pasquantino* and *Cleveland* to define "offense against property," the Second Circuit reached a conclusion that transforms the Louisiana statute at issue in *Cleveland* into an "offense against property," despite the fact that this Court held that the *Cleveland* defendants did not engage in a scheme to obtain "property." Under Louisiana law, a person or entity may not operate a video poker machine without a license obtained from the State. La. Rev. Stat. Ann. §§ 27:301-24 (2000). The State may seize and destroy or sell video poker machines operated in violation of Louisiana law. *Id.* §§ 15:31(A), 27:308(E)(3). Under the Second Circuit's reasoning, because the State is authorized to seize any video poker machine that is operated in violation of its licensing regime, the State has a property interest in that video poker machine, and a violation of the licensing regime is an offense against property. Accordingly, the defendants in *Cleveland* were committing an "offense against property" by operating video poker machines under fraudulently obtained licenses. This expansive definition of "offense against property," and the necessary corollary, thus runs afoul of this Court's jurisprudence in *Cleveland*.

4. Finally, the legislative history of the MVRA indicates that Congress did not intend for "offense against property" to encompass any offense that authorizes a government to seize and sell the object of the offense. In enacting the MVRA, Congress specifically cautioned *against* expanding the scope of the MVRA's application:

> [T]he committee specifically rejects expanding the scope of offenses for which restitution is available beyond those for which it is available under current law. Regulatory or other statutes governing criminal conduct for which restitution is not presently available historically contain their own methods of providing restitution to victims and of establishing systems of sanctions and reparations that the committee believes should be left unaffected by this act.

S. Rep. No. 104-179, at 19 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 932. The Second Circuit's opinion ventures far beyond any recognized authority for imposing restitution under the MVRA.

This Court should grant this petition in order to clarify that, in determining whether an offense constitutes an "offense against property" under the MVRA, sentencing courts should apply the categorical approach and look to the nature and elements of the defendant's conviction, rather than the defendant's specific conduct. Additionally, this Court should grant the petition in order to prevent the Second Circuit's dangerous expansion of the MVRA from improperly leading district courts to impose mandatory restitution in circumstances where Congress never intended to require restitution.

II. The Second Circuit's Conclusion that Foreign Sovereigns May be "Victims" Under the MVRA and VWPA and Recover Restitution for Harm Caused by Violations of Foreign Law Disregards the Presumption Against Extraterritoriality, the Penal Law Rule, and the Limits of Proximate Causation

The Second Circuit's decision improperly broadens the scope of restitution orders that courts may impose on defendants convicted of scheme offenses. First, the Second Circuit's decision directly contravenes the statutory language, legislative history, and this Court's precedent, all of which establish that foreign sovereigns cannot qualify as "victims" under the MVRA and VWPA. Second, disregarding statutorily mandated causation requirements, the Second Circuit's decision illogically concludes that a foreign government may be a victim of a scheme offense against the United States where only unproven violations of foreign law, and not the offense itself, harm the foreign sovereign. This conclusion invites foreign governments to pursue remedies in United States courts to which they are not entitled under the penal law rule and to which they may not be entitled under their own laws, thereby disregarding this Court's jurisprudence, presenting complicated issues of comity, and overburdening our courts and prosecutors.

1. In concluding that a foreign government may be a "victim" under the MVRA and VWPA, the Second Circuit failed to reconcile its decision with the Dictionary Act, 1 U.S.C. § 1, and this Court's precedent presumptively excluding sovereigns from statutory uses of the term "person." Under the MVRA and VWPA, "victim" is

defined as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered[.]" 18 U.S.C. §§ 3663(a)(2); 3663A(a)(2). The term "person" is not defined in the restitution statutes. The Dictionary Act provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals[.]" 1 U.S.C. § 1. Ordinarily, the term "person" does not include a sovereign, and statutes employing the word are generally construed to exclude the government. *See, e.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) (invoking this Court's "longstanding interpretative presumption that 'person' does not include the sovereign"); *United States v. United Mine Workers*, 330 U.S. 258, 275 (1947) ("In common usage [the term 'persons'] does not include the sovereign, and statutes employing it will ordinarily not be construed to do so.").

The United States government and its agencies have been considered "persons" within the meaning of section 3663 because the restitution statutes explicitly recognize the "United States" as a potential victim. *See* 18 U.S.C. § 3664(i); *see also United States v. Ekanem*, 383 F.3d 40, 43-44 (2d Cir. 2004) (the United States "fits within the meaning of 'victim' under the MVRA[ ]" because section 3664(i) specifically references the United States as a victim). But the restitution statutes do not explicitly recognize foreign governments as potential victims, and no provision in the restitution statutes refers to foreign governments. Indeed, nothing in the restitution statutes suggests that a foreign government was intended to be

included in the definition of "person." *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

Indeed, if read to include foreign governments as potential victims, the statutory language creates anomalies. For example, 18 U.S.C. § 3664, which describes the procedure for enforcing restitution orders, provides that "[a]ny amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—(A) any Federal civil proceeding; and (B) any State civil proceeding, to the extent provided by the law of the State." 18 U.S.C. § 3664(j)(2). If "victim" includes foreign governments, the statute creates a senseless distinction between a foreign government's recovery in federal and state civil proceedings, which would be considered under the statute, and foreign civil proceedings, which would not. This distinction would allow foreign governments to obtain double recoveries that would not be tolerated for claims litigated in United States courts and that would be in direct conflict with Congress's stated intent "to assure that the victim does not receive double damages." S. Rep. No. 97-532, at 32 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2538 (legislative history of 18 U.S.C. § 3579, the precursor to 18 U.S.C. § 3663 *et seq.*). Further, section 3664 provides that "[i]n any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution." 18 U.S.C. § 3664(i). If, as the Second Circuit concluded, the term "victim" includes foreign governments, the language creates an absurd distinction between the United States government and

foreign governments, and gives foreign governments priority over the United States in obtaining restitution.

There is also no judicial precedent for including foreign governments within the definition of "person" in section 3663. Excluding this case, we are not aware of any reported decisions holding that a defendant should be ordered to pay restitution to a foreign government pursuant to the MVRA or VWPA. Indeed, although the District Court relied on this Court's decision in *Pasquantino* for its conclusion that "South Africa's status as a foreign sovereign does not preclude it from being a victim and thus qualifying for a restitution award[,]" App. 58a-59a, the question of whether a foreign sovereign may be a "victim" under the MVRA and VWPA was not before the Court in *Pasquantino*, which left open the possibility that the MVRA does not permit restitution awards to foreign sovereigns. *Pasquantino*, 544 U.S. at 365. In fact, the defendants in *Pasquantino* were not ordered to pay restitution, and in the district court, the United States acknowledged that restitution would be inappropriate because "the victim is a foreign government and the loss derives from tax laws of the foreign government." *Id.* at 382 (Ginsburg, J., dissenting) (internal quotation marks omitted).

This Court's jurisprudence suggests that a foreign sovereign is *not* a proper victim under the MVRA and VWPA. On the same day that this Court decided *Pasquantino*, it also issued a decision in *Small v. United States*, 544 U.S. 385 (2005), emphasizing that, "[i]n determining the scope of the statutory phrase, we find help in the commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.* at 388

(internal quotation marks omitted). Permitting foreign sovereigns to be victims under the MVRA and VWPA would violate this Court's long-established principle that, absent a clear statement of "the affirmative intention of the Congress," *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957), this Court ordinarily does not read statutes to reach conduct that is "the primary concern of a foreign country." *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 286 (1949); *see also Morrison v. Nat'l Australia Bank Ltd.*, -- U.S. --, 130 S. Ct. 2869, 2877 (2010) (applying the presumption that, unless a contrary intent is clearly expressed by Congress, statutes apply to domestic matters because "Congress ordinarily legislates with respect to domestic, not foreign matters").

2. The fact that Congress explicitly included foreign governments in its definition of "person" in other statutes supports the conclusion that Congress intentionally omitted foreign governments from its definition of "victim" and "person" in the MVRA and VWPA. *See, e.g.*, 16 U.S.C. § 1532(13) ("The term 'person' means . . . any officer, employee, agent, department, or instrumentality of . . . any foreign government[.]"); 22 U.S.C. § 6023(11) ("The term 'person' means any person or entity, including any agency or instrumentality of a foreign state."). Indeed, the legislative histories of the MVRA and VWPA suggest that Congress did not intend foreign sovereigns to qualify as "victims," as Congress was primarily concerned with ensuring that *individual* victims of crime be compensated for their losses, not foreign governments. *See, e.g.*, H.R. Rep. No. 104-16, at 4 (1995) ("The costs associated with crime—economic, physical and emotional—for individuals, families, and the country is enormous.").

Because of the important international implications of the question of whether a foreign sovereign may recover restitution under the MVRA and VWPA, as well as the Second Circuit's disregard of well-established rules of statutory construction and case law, this petition should be granted.

3. Even if a foreign sovereign could be considered a "victim" under the restitution statutes, the Second Circuit's decision incorrectly expands the restitution remedy beyond the statutory authorization. In *Hughey v. United States*, 495 U.S. 411 (1990), this Court held that under the VWPA, a district court was authorized to impose restitution only for the loss caused by the conduct that was the basis for the offense of conviction. In the aftermath of *Hughey*, Congress amended the VWPA by adding 18 U.S.C. § 3663(a)(2), which now provides:

> For purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

Id. To the extent that this amendment expands the authority of district courts to order restitution beyond the limitation identified in *Hughey*, the district courts' authority is not limitless: in conspiracy cases, restitution may be ordered only for harm "directly and proximately"

caused by the "defendant's criminal conduct" in the course of the conspiracy. 18 U.S.C. §§ 3663(a)(2), 3663A(a)(2).[1]

On its face, this language allows a district court to impose restitution only for harm caused by the *defendant's* conduct; it does not include harm caused by others. Moreover, this language should be limited to harm caused by the defendant's *criminal conduct in the United States*, and should not include conduct in foreign countries in violation of foreign law. Addressing a similar issue in *Small*, this Court held that the language "convicted in any court" in a statute prohibiting gun possession by felons, 18 U.S.C. § 922(g)(1), encompasses only domestic, not foreign convictions. 544 U.S. at 387. The Court emphasized that "foreign convictions differ from domestic convictions in important ways[,]" including that foreign laws may prohibit conduct that domestic laws permit. *Id.* at 389. Thus, this Court "assume[d] a congressional intent that the phrase 'convicted in any court' applies domestically, not extraterritorially," *id.* at 390-91, and concluded that nothing indicated that the assumption was overcome: the statutory language did not suggest any intent to reach foreign convictions, the subject matter was not one that made foreign convictions especially relevant, and including foreign convictions would create anomalies in the statute's language. *See id.* at 391. The same assumption should apply to the phrase "defendant's criminal conduct" in the MVRA and VWPA, and nothing in the statutes or their legislative histories suggests that Congress intended the phrase "criminal conduct" to include foreign criminal conduct.

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1. The MVRA, which was enacted in 1996, employs the same language.

That harm caused by the "defendant's criminal conduct" should be limited to the defendant's United States criminal conduct is also supported by the penal law rule, which provides that federal courts do not enforce the penal laws of a sovereign state:

> By the law of England and of the United States the penal laws of a country do not reach beyond its own territory except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only, and cannot be enforced by the courts of another country.

Wisconsin v. Pelican Ins. Co. of New Orleans, 127 U.S. 265, 289-90 (1888). This rule applies to all claims through which a sovereign seeks to recover pecuniary penalties for violations of its laws. *See id.* at 290 ("The rule that the courts of no country execute the penal laws of another applies . . . to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws . . . ."). Allowing a foreign sovereign to recover restitution in United States courts for damages caused by a defendant's violation of foreign law would run afoul of the penal law rule, as it would authorize a foreign sovereign to make a claim in a United States court for damages the sovereign suffered in its sovereign capacity. *See also Foley Bros.*, 336 U.S. at 285 ("Congress is primarily concerned with domestic conditions" and absent express congressional intent, a statute does not apply to foreign conduct); *United States v. Corey*, 232 F.3d 1166, 1170 (9th Cir. 2000) (the rule that statutes do not apply to foreign conduct "ensures that we do not precipitate 'unintended clashes between

our laws and those of other nations which could result in international discord.'" (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

The requirement that a "victim" under the MVRA and VWPA be "directly and proximately" harmed by the defendant's criminal conduct further supports the conclusion that restitution may be ordered only for harm caused by the defendant's United States criminal conduct. Though this Court has long noted the difficulty in defining and applying the concept of direct or proximate cause, *see, e.g.*, *Howard Fire Ins. Co. v. Norwich & N.Y. Transp. Co.*, 79 U.S. 194, 199 (1870), it is universally recognized as a "judicial tool[] used to limit a person's responsibility for the consequences of that person's own acts[.]" *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 654 (2008); *see also Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (proximate cause is more than "but for" causation); *Hemi Group, LLC v. City of New York*, -- U.S. --, 130 S. Ct. 983, 989 (2010) (in determining the proximate cause of an injury, courts should not "'go beyond the first step'" (quoting *Holmes*, 503 U.S. at 271-72)). Interpreting the MVRA and VWPA to permit foreign sovereigns to recover restitution, in the course of a United States prosecution, for harm caused by unadjudicated violations of foreign law would unquestionably "go beyond the first step," expanding the defendant's liability far beyond the consequences of the direct and proximate consequences of the defendant's offense.

As a practical matter, this conclusion makes sense. If violations of foreign law may give rise to restitution in connection with a conviction in the United States, then United States courts will be required to evaluate the

impact of violations of foreign law on foreign sovereigns. But the determination of harm, if any, to a foreign sovereign caused by a violation of foreign law is one uniquely within the province of the foreign sovereign. This issue is "the primary concern of a foreign country[,]" *Foley Bros.*, 336 U.S. at 286, and should not be addressed in the United States judicial system. This is especially true where, as in this case, the foreign sovereign has an established legal system and effective law enforcement agencies to combat the conduct at issue.

4. In this case, the Second Circuit disregarded the penal law rule and this Court's guidance in *Small*, as well as the statutory limitation that restitution may be ordered only for harm directly and proximately caused by the defendant's United States criminal conduct, and ordered the District Court to impose restitution for harm caused to South Africa by Hout Bay's and others' admitted South African criminal violations, and Petitioners' unadjudicated foreign conduct. But Petitioners did not plead guilty to overfishing in South Africa, and overfishing in South Africa is not a violation of U.S. law. The gravamen of Petitioners' offenses of conviction was an agreement to import into the United States lobster caught in violation of South African law. The Lacey Act and the federal smuggling statute, which Petitioners conspired to violate, are designed to protect the environment and regulate the movement of goods into and within channels of American commerce, respectively; they do not regulate fishing in South Africa.

Under these circumstances, the Second Circuit's ultimate conclusion that South Africa is entitled to restitution as a result of the overfishing violates the penal law rule. In the proceedings against Hout Bay and

others in South Africa, the government of South Africa was entitled to seek monetary sanctions, reparations, and forfeiture in connection with overharvesting. Specifically, section 68 of Chapter 7 of the Marine Living Resources Act authorizes a South African court to order forfeiture of "any fish caught unlawfully or the proceeds of sale of such fish or any perishables," and section 69 of the same chapter vests the Minister of the Department of Environmental Affairs and Tourism with authority to dispose of the forfeited fish. App. 95a-96a. Indeed, South Africa did seize a container of fish caught by Hout Bay. That Hout Bay concealed its overharvesting by off-loading lobster at night and under-reporting the catch did not prevent the government of South Africa from recovering the value of the lobster, because the Marine Living Resources Act authorizes the South African court to order forfeiture of the fish *or* the proceeds from the sale of the fish. Thus, the South African government, through its courts, indisputably had the ability to recover the overharvested lobster or the proceeds thereof, but sought no such recovery in the South African proceedings. Instead, it asked the United States courts to provide that recovery through a restitution award. By allowing South Africa to obtain restitution, the Second Circuit is countenancing a foreign sovereign's recovery in a United States court for damages the sovereign suffered as a result of violations of foreign law.

Moreover, the conclusion that South Africa is a "victim" of Petitioners' offense of conviction disregards the statutory requirement that the victim be "directly and proximately" harmed. The Second Circuit summarily concluded that because Petitioners' "conduct *facilitated* the illegal harvesting of the lobsters by providing access to the United States market and enabled the poaching

to go undetected by the South African government[,]" South Africa is a "victim" under the MVRA and VWPA. App. 15a-16a (emphasis added). By reading the term "facilitate" into the statute, the Second Circuit's holding allows for the imposition of restitution far beyond what Congress has authorized, and exceeds the scope of "but for" causation: even without Petitioners' violation of U.S. law, the overfishing that the Second Circuit concluded harmed South Africa *nonetheless* may have occurred. Thus, the Second Circuit's conclusion that South Africa was "directly and proximately harmed" by the offense of conviction is not supported by the plain language of the statute, this Court's precedent, or the legislative histories of the MVRA and VWPA. *See* S. Rep. No. 104-179, at 19 (1995), *reprinted in* 1996 U.S.C.C.A.N. 924, 932 (legislative history of the MVRA making clear that "losses in which the amount of the victim's losses are speculative, or in which the victim's loss is not clearly causally linked to the offense, should not be subject to mandatory restitution"); H.R. Rep. No. 101-681(I), at 183 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6583 ("for the purposes of an offense that has as an element a scheme, a conspiracy, or a pattern of crime activity, 'victim' means a person who is directly harmed by the offense"); *cf. United States v. Kones*, 77 F.3d 66, 70 (3d Cir. 1996) (statute does not permit restitution for "anyone harmed by any activity of the defendant related to the scheme, conspiracy, or pattern[,]'" and permits restitution only where "the harm . . . 'directly' result[s] from the 'criminal conduct' of the defendant"); *United States v. Riley*, 143 F.3d 1289, 1292 (9th Cir. 1998) (adopting the Third Circuit's reasoning in *Kones*); *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996) (prohibiting restitution where the harm "does not result from conduct underlying an element of the offense of

conviction, or conduct that is part of a pattern of criminal activity that is an element of the offense of conviction").

5. Finally, the Second Circuit's overbroad interpretation of "victim" under the MVRA and VWPA unnecessarily opens the door to international issues. Through its holding, the Second Circuit invites foreign sovereigns to seize upon a malleable restitution system and seek recovery in United States courts for crimes committed in their own countries, even where the foreign sovereign either has not prosecuted the crime, or has explicitly declined to seek forfeiture or restitution within its own system. Here, South Africa already has resolved its claims in connection with the overfishing of lobster, entering into plea agreements with Hout Bay and others and expressly releasing Petitioners from liability in exchange for substantial financial penalties and forfeiture of valuable fishing rights. Yet, the Second Circuit has sanctioned South Africa's unjustified and unseemly attempt to disavow this plea agreement by requiring Petitioners to pay tens of millions of dollars in restitution to South Africa. Restitution was designed to compensate ordinary victims of certain crimes for their losses, not to allow foreign sovereigns to circumvent plea agreements made in foreign courts and the penal law rule. Ultimately, the Second Circuit's decision sends a signal to foreign governments that they may seek additional compensation, in the form of restitution, in our courts, even though that compensation is not available in their own systems. Further, in cases in which the United States seeks restitution on behalf of a foreign government that does not play an active role in the United States government's case, decisions following the Second Circuit's lead may be perceived by other countries as infringement on their sovereign rights.

This Court should grant this petition in order to clarify that a "victim" under the MVRA and VWPA must be a person directly and proximately harmed as a result of a defendant's United States criminal conduct. Additionally, this case presents an ideal opportunity for the Court to clarify that a foreign sovereign may not seek restitution in United States courts for harm suffered as a result of violations of foreign law. Finally, the question presented is extremely important and should be considered by this Court in order to avoid the issues of comity that will arise as a result of the Second Circuit's overreaching.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 4, 2011

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED JANUARY 4, 2011

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

Docket No. 07-4895-cr

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

— v.—

ARNOLD MAURICE BENGIS, JEFFREY NOLL, and DAVID BENGIS

Defendants-Appellees.

(Argued: December 10, 2008 Decided: January 4, 2011)

Before:

FEINBERG, CABRANES, AND HALL,
Circuit Judges.

The United States of America appeals from two orders of the United States District Court for the Southern District of New York (Kaplan, *J.*) denying its applications for a restitution award in favor of the Republic

of South Africa, pursuant to, first, the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A, and second, the Victim and Witness Protection Act of 1982 ("VWPA"), 18 U.S.C. § 3663. We hold that South Africa: (1) has a property interest in rock lobsters unlawfully harvested from its waters, and (2) is a victim, as defined by the MVRA and VWPA, eligible to receive restitution. Accordingly, restitution is owed to South Africa.

VACATED AND REMANDED.

HALL, *Circuit Judge*:

The United States of America appeals from two orders of the United States District Court for the Southern District of New York (Kaplan, *J.*) denying its applications for a restitution award in favor of the Republic of South Africa pursuant to, first, the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A, and second, the Victim and Witness Protection Act of 1982 ("VWPA"), 18 U.S.C. § 3663. In its first order, the district court denied the government's application for a restitution award under the MVRA, adopting the magistrate judge's report and recommendation, and holding that South Africa had no property interest in either the lobsters that the defendants took from South African waters or in any tax or other form of revenue as a result of the defendants' breach of South Africa's conservation regulatory laws. In its second order, the district court denied the government's application for a restitution award under the VWPA, again adopting the magistrate judge's report and recommendation. The district court held that in addition

to its failure to prove that the illegally harvested lobsters were the property of South Africa, the government failed to demonstrate that South Africa was a "victim," i.e., how it suffered any direct or proximate harm as a result of the defendants' conduct. The district court further held that, even if restitution was permissible as a matter of law, "the complication and prolonging of the sentencing process resulting from the fashioning of the order of restitution under this section would outweigh the need to provide restitution to the Republic of South Africa." For the reasons that follow, we hold that South Africa: (1) has a property interest in rock lobsters unlawfully harvested from its waters, (2) is a victim for restitution purposes, as defined by the MVRA and VWPA, and (3) whatever the complexity in fashioning a restitution order in this case, it is insufficient to preclude entry of such an order under the MVRA. Accordingly, the judgments of the district court are VACATED and the case is REMANDED to the district court for further proceedings consistent with this opinion.

I. Background

From 1987 to 2001, Arnold Bengis, Jeffrey Noll and David Bengis (jointly, "defendants") engaged in an elaborate scheme to illegally harvest large quantities of South Coast and West Coast rock lobsters in South African waters for export to the United States in violation of both South African and U.S. law. Arnold Bengis was the Managing Director and Chairman of Hout Bay Fishing Industries, Ltd. ("Hout Bay"), a fishing and fish-processing operation in Capetown, South Africa, through

which defendants principally organized their conspiracy to capture, process and export lobster to the United States. Jeffrey Noll and David Bengis were presidents of two U.S. corporations that imported, processed, packed, and distributed the fish within the United States on behalf of Hout Bay. At all relevant times, the harvesting, processing and exporting of South Coast and West Coast rock lobsters from South Africa was governed under South African law principally by the Marine Living Resources Act 18 of 1998 ("MLRA"), the regulations promulgated under the MLRA, and the Convention on the Conservation of Marine Living Resources. The South African Department of Marine and Coastal Management regulated the harvesting, processing and exporting of fish from South Africa's waters by, *inter alia*, establishing fishing season quotas and issuing harvesting and exporting permits. Defendants caused Hout Bay to harvest South Coast and West Coast rock lobsters in amounts exceeding authorized quotas and to export those lobsters to the United States.

In May 2001, South African authorities seized and opened a container of unlawfully harvested fish and alerted U.S. authorities that another container was scheduled to arrive in the United States soon thereafter. Following the May 2001 seizure, the defendants continued to attempt to avoid detection and to perpetuate their scheme.

Although South African authorities obtained arrest warrants for defendants, after concluding that defendants' financial resources and presence outside of South Africa rendered them "beyond the reach of South African authorities," *Morrison Decl.*, App. 324, South

Africa declined to charge, much less prosecute, them. Instead, South Africa focused its prosecution on the "South African-based entities involved in the scheme," including Hout Bay, its operational manager, Collin van Schalkwyk, several West Coast lobster fisherman with whom Hout Bay had contracted, and fourteen fisheries inspectors who had taken bribes during the course of the scheme. *Id.* at 325. In April 2002, Arnold Bengis returned to South Africa to enter a plea of guilty on behalf of Hout Bay for, *inter alia*, over-fishing of South and West Coast rock lobster in violation of the MLRA. According to its plea agreement with the South African government, Hout Bay paid a fine of 12 million Rand (approximately $1.2 million in April 2002) and forfeited two fishing boats and the contents of the container seized by the government. The South African government also cooperated with the United States in its investigation and prosecution of the Bengises and Noll for their violation of U.S. law.

Following their indictments in the United States, Arnold Bengis and Jeffrey Noll pleaded guilty to: (i) conspiracy to violate the Lacey Act and to commit smuggling in violation of 18 U.S.C. § 371; and (ii) violations of the Lacey Act, 16 U.S.C. § 3372(a)(2)(A).[1] David Bengis pleaded guilty to the conspiracy charge only. In

1. The Lacey Act provides in pertinent part: "It is unlawful for any person . . . (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce– (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law." 16 U.S.C. § 3372(a)(2)(A). The term "fish or wildlife" is defined to include crustaceans, such as lobsters. 16 U.S.C. § 3371(a).

2004, the defendants were sentenced to various terms of imprisonment and supervised release and together forfeited a total of $13,300,000 to the United States. Although the defendants' plea agreements acknowledged that restitution might be ordered, with the parties' consent, the district court deferred the restitution hearing to a later date.

Following the court's decision to hold a restitution hearing, the United States submitted a report prepared by the Ocean and Land Resource Assessment Consultants ("OLRAC"), a group of experts commissioned by the South African Department of Marine and Coastal Management, setting out two different methods for calculating restitution. OLRAC Method I focused on the cost of remediation, i.e., what it would cost South Africa to restore the rock lobster fishery to the level it would have been had the defendants not engaged in overharvesting (the "catch forfeit" amount).[2] OLRAC estimated restitution using the catch forfeit amount to be $46,775,150. OLRAC Method II focused on the market value of the overharvested fish and was calculated by multiplying the quantity of overharvested fish by the prevailing market price. OLRAC estimated restitution using OLRAC Method II to be $61,932,630.

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2. OLRAC Method I also included an additional cost measure, "overharvesting costs," which measured the costs incurred by Hout Bay's competitors as a result of Hout Bay's overharvesting. The government elected not to seek the amount of "overharvesting costs" in its application for restitution because those costs were not borne directly by South Africa, but rather by Hout Bay's competitors.

The government recommended that the district court adopt OLRAC Method I restitution amount—the lower of the two calculations—which totaled $39,700,000 after deducting the value of the fine and vessels previously forfeited by Hout's Bay to South Africa. Alternatively, the government recommended adopting the OLRAC Method II calculation totaling $54,900,000 after those same deductions. The district court held its decision on a restitution award in abeyance pending the outcome of settlement discussions, which ended unsuccessfully. Consequently, on June 2, 2006, the district court referred the restitution issues to a magistrate judge for a report and recommendations.

II. The Decisions Below

In separate orders, the district court denied the government's request for restitution for South Africa under the MVRA, *United States v. Bengis*, 03 Crim. 308, 2007 WL 24170, at *1 (S.D.N.Y. Jan. 29, 2007), and the VWPA, *United States v. Bengis*, 03 Crim. 308, 2007 WL 2669315, at *2 (S.D.N.Y. Sept. 12, 2007). In each order, the district court adopted by reference the reasoning in the report and recommendation ("R&R") of the magistrate judge.

A. *The MVRA*

With respect to the MVRA, the R&R concluded that pursuant to the limited categories of crimes for which restitution is mandatory, South Africa is entitled to restitution in this case only if the conduct to which

defendants plead guilty constitutes "an offense against property" under Title 18 of the United States Code, 8 U.S.C. § 3663(A)(c)(1)(A)(ii). *United States v. Bengis*, 03 Crim. 308, 2006 WL 3735654, at *2 (S.D.N.Y. Dec. 19, 2006). Under our precedents, the R&R continued, the definition of "property" is limited to "tangible property," *see United States v. Cummings*, 189 F. Supp. 2d 67, 74 (S.D.N.Y. 2002), and not "purely regulatory" interests in which "the nature of [the] property cannot not be economic," *Cleveland v. United States*, 531 U.S. 12, 13 (2000). *Id.* at *3.

Here, the magistrate judge concluded, South Africa confronts two obstacles. First, under South African law, the state does not "own" the fish in its territorial waters. *Id.* at *6. "Defendants' acts of taking fish from South African waters that the South African government did not own," therefore "does not provide the basis for any offenses against South African property that would trigger restitution under the MVRA." *Id.* at *7. Moreover, because "the South African laws that provide the basis for defendants' underlying violations here involve no type of taxes or significant revenue for South Africa," the government cannot claim a property interest in a "tax or other form of revenue" connected to defendant's activity. *Id.* at 8 (distinguishing *Pasquantino v. United States*, 544 U.S. 349, 355-57 (2005), which concluded that the Canadian government holds a property interest in the substantial liquor tax revenue that defendants avoided paying as a result of their smuggling scheme).

Finally, the district court rejected the argument that defendant's violation of the Lacey Act, itself, constituted

an offense against property pursuant to Title 18. *Id.* at *8. Like the MLRA, the Lacey Act, 16 U.S.C. § 3372(a)(2)(A) (criminalizing trade in "any fish or wildlife taken, possessed, transported, or sold . . . in violation of any foreign law."), was enacted for regulatory, and not economic, purposes, as a result of which a violation thereof is not an offense against property. *Id.* at *9.

B. *The VWPA*

Having denied mandatory restitution under the MVRA, the district court considered and rejected discretionary restitution under the VWPA, adopting the magistrate judge's conclusion that South Africa was not a "victim" of defendants' crime. *United States v. Bengis*, 03 Crim. 308, 2007 WL 2669315, at *1. In order to be a victim for the purposes of the VWPA, the loss sustained must be "'caused by the offense of conviction.'" *United States v. Bengis*, 03 Crim. 308, 2007 WL 1450381, at *3 (S.D.N.Y. May 17, 2007) (quoting *United States v. Silkowski*, 32 F.3d 682, 689 (2d Cir. 1994)). The underlying violation of the Lacey Act—the crime to which defendants pleaded guilty—related to the *trade* in illegally obtained lobsters and not the overfishing of lobster in South African waters. That is, the district court concluded, "[i]t was not necessary for the government to have proved that the defendants . . were the ones who took the fish in violation of South African law." *United States v. Bengis*, 03 Crim. 308, 2007 WL 2669315, at *1. Because the government's loss theories were predicated on the injury associated with the consequences of defendants' *overfishing*—as opposed to its *trading*—and the overfishing of lobster is not directly related to any of the required criminal conduct

under the statutes to which defendants plead guilty, the district court concluded that South Africa is not a victim under the VWPA. *United States v. Bengis*, 03 Crim. 308, 2007 WL 1450381, at *7.

Finally, the district court observed that, if discretionary restitution were available, calculating South Africa's injury would involve "complex issues of foreign law as well as intricate questions of fact," as a result of which "extensive further proceedings would be required." *United States v. Bengis*, 03 Crim. 308, 2007 WL 2669315, at *2. Accordingly, the district court held that, even if a restitution order pursuant to the VWPA were permissible, "the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section would outweigh the need to provide restitution" in this case. *Id.*

III. Discussion

On appeal, the government challenges the district court's conclusions that South Africa had no property interest in the overharvested lobsters and that it was not directly harmed as a result of the defendants' illegal scheme.

We review a district court's decision to deny an order of restitution for abuse of discretion. *Nordwind v. Rowland*, 584 F.3d 420, 429 (2d Cir. 2009). "To identify such abuse, we must conclude that a challenged ruling rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of

permissible decisions." *United States v. Pearson*, 570 F.3d 480, 486 (2d Cir. 2009) (per curiam) (internal quotation marks removed).

A. *South Africa's property interest in the illegally harvested rock lobsters*

The MVRA provides for mandatory restitution in all sentencing proceedings for convictions of any offense that is, *inter alia*, "an offense against property under [Title 18] . . . in which an identifiable victim or victims has suffered a . . . pecuniary loss." 18 U.S.C. § 3663A(c)(1)(A)(ii)-(c)(1)(B). Accordingly, the threshold question is whether South Africa has a property interest in the illegally harvested rock lobsters. We conclude that South Africa has a property right in illegally harvested rock lobsters.

Under South African law the rock lobsters may be harvested lawfully pursuant to a regulatory scheme administered by the Department of Marine and Coastal Management. Furthermore, under South African law, lobsters caught illegally are not the property of those who caught them, MLRA § 44(2), and the South African government is authorized to seize illegally harvested lobsters, sell them, and retain the proceeds, §§ 51(3)(c)(iii), 63(1)(b), 68(1). Put differently, lobsters possessed in violation of the regulatory scheme do not become property of the possessors, rather they are subject to seizure and sale by the government of South Africa. Under this logic, the moment a fisherman pulls an illegally harvested lobster out of the sea, a property right to seize that lobster is vested in the government of South Africa. Evading seizure

of overharvested lobsters thus deprives South Africa of an opportunity to sell those illegally captured lobsters at market price and retain the proceeds, representing an economic loss to South Africa each time an illegally harvested lobster goes unseized. South Africa's interest in those illegally harvested lobsters, therefore, goes beyond a mere regulatory interest in administering the fishing activities in its waters.

Contrary to the District Court's conclusion, the Supreme Court's holding in *Pasquantino*—and not *Cleveland*—provides the closest analogy to South Africa's interest in the lobsters seized by the defendants and guides our analysis here. In *Cleveland*, the Supreme Court concluded that, because its interest was "purely regulatory," the State of Louisiana *did not* have a "property" right in an unissued license to a video poker operator, despite the pre-issuance processing fees collected by the state. 531 U.S. at 20-21. As Justice Ginsburg explained, "The State receives the lion's share of its expected revenue not while the licenses remain in its own hands, but only after they have been issued to licensees. Licenses pre-issuance do not generate an ongoing stream of revenue." *Id.* Importantly, the Supreme Court noted that "as to the character of Louisiana's stake in its video poker licenses," the licensee in *Cleveland* did not "defraud the state of any money to which the State was entitled by law." *Id.* at 22.

By contrast, in *Pasquantino*, the Supreme Court held that Canada *did* possess a "property" right to uncollected excise taxes on liquor that was illegally imported into the

country. The uncollected tax, Justice Thomas reasoned, was a right to "collect money" which is a "valuable entitlement" considered to be "'property' as that term ordinarily is employed." *Pasquantino*, 544 U.S. at 355-56 (*citing* Black's Law Dictionary 1382 (4th ed. 1951) (defining defining "property" as "extend[ing] to every species of valuable right and interest") (citations ommitted); *see also Pasquantino*, 544 U.S. at 356 ("The right to be paid money has long been thought to be a species of property.") (citing 3 W. Blackstone, Commentaries on the Laws of England 153-155 (1768)). The Court had no doubt that the right to collect that revenue was "'something of value' to the Government of Canada." *Id.* at 355 (quoting *McNally v. United States*, 483 U.S. 350, 358 (1987)).

As a result, the *Pasquantino* Court clearly distinguished its earlier holding in *Cleveland*. In *Cleveland*, the "State's interest in an unissued video poker license was not 'property,' because the interest in choosing particular licensees was 'purely regulatory' and '[could not] be economic,'" *id.* at 357 (quoting *Cleveland*, 531 U.S. at 22-23). Indeed, "the Government nowhere allege[d] that [the defendant] defrauded the State of any money to which the State was entitled by law." *Id.* In *Pasquantino*, on the other hand, "Canada's entitlement to tax revenue is a straightforward 'economic' interest . . . the Government alleged and proved that petitioners' scheme aimed at depriving Canada of money to which it was entitled by law." *Id.*

Like the defendants in *Pasquantino*, Arnold Bengis, Jeffrey Noll, and David Bengis' conspiracy to conceal their

illegal trade in lobster deprived South Africa of money it was due. Had the defendants not undertaken efforts to conceal their overharvesting, including off-loading overharvested lobsters at night and under-reporting the amounts of their catch to South African authorities, those lobsters caught in excess of the legal limits would have been seized and sold by the government. As a consequence, the defendants' conduct deprived South Africa of proceeds from the sale of the illegally harvested lobsters, i.e., "money to which it was entitled by law." *Id.* Just as in *Pasquantino*, "had [defendants] complied with [their] legal obligation, they would have paid money to [South Africa]." Like Canada's entitlement to its uncollected excise tax revenue in *Pasquantino*, South Africa's entitlement to the revenue from the lobsters that were taken illegally does constitute "property." The defendants' conduct in depriving South Africa of that revenue is, therefore, an offense against property.[3]

B. *South Africa as a "victim" under the MVRA and VWPA*

Both the MVRA and VWPA contemplate that a court must or may order the defendant to pay restitution to a "victim." 18 U.S.C. § 3663A(a)(1); § 3663(a)(1)(A). Both statutes define a "victim" as:

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3. We also reject the R&R's reliance on the district court cases suggesting that "offenses against property" are limited to offenses against "tangible property," including money. Our precedents dictate that the definition of property is broader than those cases suggest. *See United States v. Milstein*, 481 F.3d 132, 137 (2d Cir. 2007) (recognizing intangible property).

> a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

Id. § 3663A(a)(2); § 3663(a)(2). In its second order adopting the magistrate judge's report, the district court denied restitution under the VWPA on the ground that South Africa was not a "victim" entitled to restitution because it had failed to show that it had suffered any losses directly caused by the defendants' illegal scheme. We disagree.

Relying on the magistrate judge's report and district court's order, the defendants contend that, even if South Africa had a property right in the lobsters, it is not a victim of the conspiracy because the conspiracy to which the defendants pleaded guilty did not involve the illegal harvesting of the lobsters, only their importation to the United States with the knowledge that the lobsters had been obtained in violation of South African law. We are not persuaded. The defendants need not have personally harvested the lobsters in order to have deprived the South African government of its property right in the lobsters. By smuggling the lobsters out of South Africa knowing that they had been harvested unlawfully, defendants deprived the South African government of its right to seize and sell the poached lobsters. The defendants' conduct facilitated the illegal harvesting of the lobsters by

providing access to the United States market and enabled the poaching to go undetected by the South African government by, for example, off-loading the overharvested lobster at night, under-reporting catch amounts to South African authorities, bribing officials, and submitting false export documents. In doing so, the defendants' criminal conduct "directly harmed" the South African government, which in turn makes South Africa eligible for restitution under the VWPA and MVRA. *See* 18 U.S.C. § 3663A(a)(2); § 3663(a)(2).

Because South Africa had a property interest in the illegally harvested lobsters and is a victim for purposes of restitution, we hold that the MVRA governs the restitution award at issue here.

C. *Calculating a Restitution Award*

We further conclude that the facts on the record do not support the district court's finding that the complexity of fashioning an award of restitution would further complicate and prolong the sentence so that the burden on the sentencing process outweighs any need to provide restitution to which South Africa is entitled. *See* 18 U.S.C. § 3663A(c)(3). Given our analysis of the nature of South Africa's property interest and our review of the record, OLRAC Method II seems to us a sufficient loss calculation methodology under the circumstances presented by this case. This method most directly traces the nature of the loss inflicted on South Africa because, had the poaching been detected, South Africa would have been entitled to seize the illegally harvested lobsters at that time and sell

them at market price for its own benefit. Restitution would thus be calculated by multiplying the number of poached lobsters by the corresponding market price (based on the prevailing market rates at the time the lobsters were poached). Every overharvested lobster that South Africa did not seize and sell represents a loss that has not been recovered.

We note, furthermore, that there is no problem in imposing both a restitution award and a forfeiture award in this case. *See United States v. Kalish*, 626 F.3d 165, 169-70 (2d Cir. 2010) (noting that "simultaneous imposition" of both a forfeiture remedy and a restitution remedy, authorized by separate statutes, "offends no constitutional provision"). We leave to the district court's determination in the first instance all relevant issues relating to the amount of restitution, whether any off-set should apply, and if so, whether there should be one based on the forfeiture. We note in passing, however, that to the extent that a restitution award for South Africa that is derived from the market value of the illegally harvested lobsters might be duplicative of the sums that defendants have already forfeited to the United States, the government may exercise its discretion to transfer the forfeited funds to South Africa, in order to reduce the restitution award by the amount defendants have already forfeited. *See* Gov't Br. 56 n.* ("Under the Department of Justice's Restoration Policy, once the District Court orders restitution, the Government would have the discretion to forward those monies to South Africa in partial satisfaction of the defendants' restitution obligations."). We express no view as to how such issues should be resolved.

IV. Conclusion

For the foregoing reasons, the judgments of the district court are VACATED, and the case is REMANDED to the district court with instructions to calculate restitution and enter an order of restitution in favor of the Republic of South Africa.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED SEPTEMBER 12, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 Crim. 0308 (LAK)

UNITED STATES OF AMERICA,

-against-

ARNOLD MAURICE BENGIS, et al.,

Defendants.

ORDER

LEWIS A. KAPLAN, *District Judge.*

Following this Court's denial of the government's effort to obtain restitution in favor of the Republic of South Africa pursuant to the Mandatory Victims Restitution Act, the government pressed its application for such restitution pursuant to the Victim and Witness Protection Act (the "VWPA"). In a well considered and persuasive report and recommendation dated May 17, 2007 (the "R&R"), Magistrate Judge Andrew J. Peck recommended denial of the request, essentially on the ground that the Republic of South Africa did not suffer any losses directly caused by defendants' offense conduct, as required by the

VWPA The government objects to the R&R, arguing that Magistrate Judge Peck erred as a matter of law.

The government argues primarily that the R&R erred in concluding that the over fishing of lobster in South African waters, the conduct that allegedly resulted in the claimed loss, was directly related to the conspiracy charge to which the defendants' pleaded guilty on the theory that they admitted that the illegally imported fish were "taken ... in violation of ... foreign [South African] law." Govt' Obj. 3. The government is right, of course, that the defendants so admitted. But the essential elements of the Lacey Act relevant here are (1) the import into the United States of fish (2) *with knowledge* that the fish had been taken in violation of South African law. It was not necessary for the government to have proved that the defendants or, for that matter, their co-conspirators were the ones who took the fish in violation of South African law. While that may well have been so, it was not an essential element of the offense. In consequence, the Court agrees with Judge Peck that the over fishing that allegedly resulted in loss to South Africa was not directly related to the defendants' criminal conduct. It agrees also that the fact that South Africa did not own the fish in question forecloses a conclusion that it was a victim within the meaning of the VWPA, notwithstanding that it may be assumed that the over fishing harmed South African natural resources.

The foregoing is sufficient to dispose of the government's objections.[1] But the time has come to go one step further.

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1. The Court has considered the government's remaining arguments and concluded that they lack merit.

Appendix B

The VWPA provides also that, "[t]o the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order." 18 U.S.C. § 3663(a)(1)(B)(ii).

The record in this case demonstrates that proceedings with respect to restitution have been complicated and prolonged. The three defendants against whom the government seeks restitution pleaded guilty over three years ago, with the determination of restitution deferred in light of the complexity of the task. Proceedings with respect to restitution have been going on ever since. They have raised complex issues of foreign law as well as intricate factual questions. The government's restitution theories rest on economic models, the reliability and bases of which would have to be tested at a hearing. There is a strong likelihood that these models would be contested by other expert witnesses. In consequence, even if the Court were to agree with the government that the VWPA permits restitution in favor of the Republic of South Africa for the injuries claimed here, we might well be closer to the beginning than the end of the process of determining the amount of restitution. In any case, extensive further proceedings would be required.

The need for undertaking this task is questionable. At least one of the two economic models proffered by the government seeks to quantify the appropriate amount of restitution by estimating the costs that South Africa

could incur to restore the over fished lobster populations to their original levels. R&R at 16. It appears to be undisputed, however, that the Republic of South Africa, despite the lengthy interval between the discovery of the over fishing and today, has taken no action to replenish its lobster reserves. To the contrary, it has increased the total allowable catch of lobster for the industry. *Id.* at 16-17. Moreover, were South Africa determined to restore the *status quo ante,* it could restrict fishing to replenish the natural resource without any cost to the Republic. *Id.* at 17. The fact that it has not done so undermines any claim that there is a substantial "need to provide restitution to" the Republic of South Africa, even assuming that it is a victim within the meaning of the VWPA.

Accordingly, the Court holds that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section would outweigh the need to provide restitution to the Republic of South Africa even if the Republic were a permissible beneficiary of restitution on the facts of this case. It therefore would decline to make any restitution order even if such an order were permissible as a matter of law.

It perhaps might be contended that this latter determination could have been made long ago, thus avoiding the proceedings in the intervening years. It is important, however, to understand that the complexity and difficulty of the process, as well as the failure of the Republic of South Africa to seek to replenish the resource, became fully apparent only with the passage of time. In

addition, the Court took substantial pains to ensure that the government had a full and complete opportunity to present the case in favor of the Republic of South Africa out of respect and deference to a sovereign nation.

SO ORDERED.

Dated: September 12, 2007

/s/
Lewis A. Kaplan
United States District Judge

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED MAY 17, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 Cr. 308 (LAK) (AJP)

UNITED STATES OF AMERICA,

Plaintiff,

-against-

ARNOLD MAURICE BENGIS, JEFFREY NOLL & DAVID BENGIS,

Defendants.

REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Lewis A. Kaplan, United States District Judge:

On January 29, 2007, Judge Kaplan adopted my Report and Recommendation to decline to order restitution from defendants Arnold Bengis, Jeffrey Noll and David Bengis under the Mandatory Victims Restitution Act ("MVRA"). *See United States v. Bengis*, 03 Cr. 0308, 2007 WL 241370

(S.D.N.Y. Jan. 29, 2007) (Kaplan, D.J.), *adopting* 2006 WL 3735654 (S.D.N.Y. Dec. 19, 2006) (Peck, M.J.), familiarity with which is assumed. The Government now requests that the Court order defendants to pay over $41 million in restitution under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663. (Gov't VWPA Br. at 25.)

The problem with the Government's application is that it essentially re-argues that restitution is proper because the lobsters belong to South Africa, *i.e.*, are South Africa's property, a claim which this Court rejected under the MVRA. While the VWPA is not limited to offenses against property, the VWPA does require direct harm to the "victim," and the Government's direct harm argument is premised on its claim that the lobsters belonged to South Africa - a claim this Court already has rejected.

For the reasons set forth below, the Court should reject the Government's request for restitution under the Victim and Witness Protection Act.

Appendix C

ANALYSIS[1]

THE VICTIM AND WITNESS PROTECTION ACT

A. *General Requirements for Sentencing Under the VWPA*[2]

The VWPA states that "[t]he court, when sentencing a defendant convicted of an offense under this title ... other than an offense described in section 3663A(c) [*i.e.*, the Mandatory Victims Restitution Act], may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense ... " 18 U.S.C. § 3663(a)(1)(A). Under the VWPA, "[t]he court, in determining whether to order restitution under this section, shall consider - (I) the amount of the loss sustained

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1. The factual background to this motion is set forth in this Court's prior opinion, familiarity with which is assumed.

2. In their brief opposing the Government's request for an order of restitution under the VWPA, defendants renew their argument that the federal restitution scheme is unconstitutional as applied to defendants under *Blakely v. Washington* and its progeny. (*See* Dkt. No. 130: Defs. VWPA Opp. Br. at 19-24.) Because the Court previously addressed and rejected this argument, *see United States v. Bengis*, 03 Crim. 0308, 2006 WL 3735654 at *2 n.7 (S.D.N.Y. Dec. 19, 2006) (Peck, M.J.), *report & rec. adopted*, 2007 WL 241370 (S.D.N.Y. Jan. 29, 2007) (Kaplan, D.J.), and because defendants concede that this Court remains bound by the Second Circuit's decision in *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006) (Defs. VWPA Opp. Br. at 22.), the Court will not further address this issue.

by each victim as a result of the offense; and (II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. § 3663(a)(1)(B)(i).

The VWPA provides that, "[t]o the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order." 18 U.S.C. § 3663(a)(1)(B)(ii).[3]

Most importantly for deciding the Government's request for restitution, under the VWPA, "the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663(a)(2).

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3. The length of time that it took the parties to brief the restitution issue in this case, the theoretical nature of the Government's loss calculations, the Government's modifications of its damage theories, and defendants' factual and *Daubert* challenges to the Government's damage calculations, all suggest that the Court could decline to order restitution under this "complexity" section of the VWPA. However, because restitution under the VWPA should be denied on other grounds, the Court does not reach the "complexity" issue.

Appendix C

The VWPA also provides guidelines for what a court should consider when fashioning a restitution award thereunder:

> (b) The [restitution] order may require that such defendant-
>
> > (1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense -
> >
> > > (A) return the property to the owner of the property or someone designated by the owner; or
> >
> > > (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of -
> >
> > > > (i) the value of the property on the date of the damage, loss, or destruction, or
> >
> > > > (ii) the value of the property on the date of sentencing,
> >
> > > > less the value (as of the date the property is returned) of any part of the property that is returned.

18 U.S.C. § 3663(b)(1).

Appendix C

B. *A Restitution Order Under the VWPA May Only Consider Losses Directly Caused By A Defendant's Offense Conduct*

The Tenth Circuit has noted that:

> Section 3663 of title 18 specifically requires a court ordering restitution to consider "the amount of the *loss sustained* by a victim as a result of the offense." Thus, unlike the sentencing guidelines, which allow a court to consider actual or intended loss for the purposes of sentencing, section 3663 implicitly requires that an award of restitution be based on the amount of loss actually caused by the defendant's offense.

United States v. Messner, 107 F.3d 1448, 1455 (10th Cir. 1997) (citations & footnotes omitted, emphasis in original); *see also, e.g., United States v. Germosen*, 139 F.3d 120, 130, 131 (2d Cir. 1998) ("[T]he Sentencing Guidelines allow[] for a loss calculation based on 'intended loss,' whereas [the VWPA] requires a showing of actual loss for purposes of restitution." "Absent a stipulation in a plea agreement, a sentencing court may award restitution only for losses directly resulting from the 'conduct forming the basis for the offense of conviction.'"), *cert. denied*, 525 U.S. 1083, 119 S. Ct. 829 (1999); *United States v. Blake*, 81 F.3d 498, 506 n.5 (4th Cir. 1996) ("The definition of victim provided in [the VWPA] is much narrower than the one in the [sentencing] guidelines, and it is § 3663 - not the guidelines - that governs the authority of a sentencing court to require restitution."); *United States v. Silkowski*, 32 F.3d

682, 688 (2d Cir. 1994) ("Where the issue is the amount of loss to be repaid by a defendant under a restitution order, . . . the scope of conduct that a district court may consider in determining the amount of loss is governed by different considerations than those set forth in the relevant conduct provision of the Guidelines. Rather, the Guidelines authorize a district court to 'enter a restitution order if such order is authorized under 18 U.S.C. §§ 3663-3664.' Thus, 18 U.S.C. §§ 3663-3664, the [VWPA], not the Guidelines themselves, ultimately governs a sentencing court's authority to determine and impose a restitution penalty on a criminal defendant.") (citations & emphasis omitted).

In *Hughey v. United States*, the Supreme Court clarified that the VWPA "authorize[s] an award of restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction." *Hughey v. United States*, 495 U.S. 411, 413, 110 S. Ct. 1979, 1981 (1990). In response to the *Hughey* decision, Congress amended the VWPA to include its current language, which incorporates "two significant changes: 1) With respect to offenses involving a scheme, conspiracy, or pattern of criminal activity, they broadened the class of 'victims' to include any person directly harmed by the defendant's criminal conduct; and 2) They allowed courts to order restitution 'to the extent agreed to by the parties in a plea agreement.'" *United States v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995) (citations omitted);[4] *see also* 18

4. "Although this amendment superseded *Hughey's* holding in part, [the Fourth Circuit] has recognized that *Hughey* still applies when, in the absence of an appropriate plea agreement that provides for restitution, a restitution award clearly encompasses an

[defendant] acknowledged in the plea agreement the possibility that restitution might be awarded, that acknowledgment fell well short of agreement."); *United States v. Broughton-Jones*, 71 F.3d 1143, 1148 (4th Cir. 1995)(Defendant's "acknowledgment at the Rule 11 [plea] colloquy that she might be ordered to pay restitution does not independently invoke the district court's power to order restitution under 18 U.S.C. § 3663(a)(3)."); *United States v. Silkowski*, 32 F.3d 682, 689 (2d Cir. 1994) ("The plea agreement's general requirement that [defendant] make full restitution for the loss suffered ... fails to alter our conclusion that the defendant in this case did not agree to pay for any losses that exceeded those caused by the offense of conviction."); *United States v. Patty*, 992 F.2d 1045, 1051 (10th Cir. 1993) (Although defendant agreed in her plea agreement "that she would pay restitution in an amount not to exceed $25,000,000 ... she could not be ordered to pay restitution in excess of those losses which the government proved were the result of her fraudulent acts."); *United States v. Ramilo*, 986 F.2d 333, 333 (9th Cir. 1993) (Although defendant stated in plea agreement that he "'understands that the court may order restitution ... to the following individuals in the amounts listed,'" the Ninth Circuit found that this statement was not an agreement to pay restitution and did not authorize restitution.). As this Court noted in its prior Opinion:

> While all their plea agreements state that restitution "must" be ordered under §§ 3663, 3663A, defendants contend that restitution "must" be ordered "in accordance with law . . . [and] that the law does not permit the Court

U.S.C. § 3663(a).[5] Therefore, when ordering restitution under the VWPA, district courts now must consider the matter in two stages: "First, we determine whether the parties agreed to an amount of restitution in a plea agreement; such agreements may authorize restitution in an amount greater than the loss attributable to the offense of conviction. If the plea agreement does not provide for a larger amount, the court still may order restitution to any 'victim' to the extent of the loss caused by an offense of conviction." *United States v. Broughton-Jones*, 71 F.3d at 1148 (citations omitted).

Here, defendants' plea agreements stated that "the Court must order restitution in accordance with Sections 3663, 3663A and 3664 of Title 18, United States Code. This amount shall be paid according to a plan established by the Court." (Defs. Binder Ex. 8: Gov't Opp. Br. Exs. D, E, & F at 2.) Because defendants' plea agreements include only general language regarding restitution, the Court is not bound to order restitution in any particular amount to any particular victim or to order restitution at all if it is not permitted by the MVRA or VWPA. *See, e.g., United States v. Reynolds*, 432 F.3d 821, 823 (8th Cir. 2005) ("Although

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offense for which the defendant was not convicted." *United States v. Blake*, 81 F.3d at 506 n.6 (quotations omitted).

5. Section 3663(a) as amended contains this additional sentence:

> The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

18 U.S.C. § 3663(a).

> in these circumstances to enter an order of restitution based upon this record." (Gov't Binder Ex. H: 5/20/05 Conf. Tr. at 12.)

United States v. Bengis, 2006 WL 3735654 at *1 n.4. Indeed, the Government's briefs here do not argue that restitution must (or even should) be ordered because of the plea agreements. Therefore, the Court must consider whether South Africa is a "victim" of defendants' crimes of conviction, and if so, what was the extent of South Africa's loss.

The 1990 amendment to the VWPA "does not authorize a district court to order restitution to all individuals harmed by a defendant's criminal conduct." *United States v. Blake*, 81 F.3d at 506. "For a person to be considered a victim under § 3663, the act that harms the individual must be either conduct underlying an element of the offense of conviction, or an act taken in furtherance of a scheme, conspiracy, or pattern of criminal activity that is specifically included as an element of the offense of conviction." *United States v. Blake*, 81 F.3d at 506; *see, e.g., United States v. Broughton-Jones*, 71 F.3d at 1148-49; *United States v. Obasohan*, 73 F.3d 309, 311 (11th Cir. 1996). Therefore, "a defendant convicted of conspiracy can be required to pay restitution for all losses resulting from acts in furtherance of the conspiracy." *United States v. Obasohan*, 73 F.3d at 311; *see also, e.g., United States v. Plumley*, 993 F.2d 1140, 1142 (4th Cir.), *cert. denied*, 510 U.S. 903, 114 S. Ct. 279 (1993). "But, if the harm to the person does not result from conduct underlying an element of the offense of conviction, or conduct that is

part of a pattern of criminal activity that is an element of the offense of conviction, the district court may not order the defendant to pay restitution to that individual." *United States v. Blake*, 81 F.3d at 506; *see also, e.g., United States v. Henoud*, 81 F.3d 484, 488 (4th Cir. 1996.) ("[t]he harm must be a direct result of the defendant's criminal conduct ... or 'closely related to the scheme.'"); *United States v. Kones*, 77 F.3d 66, 70 (3d Cir.) (" Section 3663(a)(2) is not so broad that it permits a district court to order restitution to anyone harmed by any activity of the defendant related to the scheme, conspiracy, or pattern. Rather, in order for restitution to be permissible, the harm must 'directly' result from the 'criminal conduct' of the defendant. In this context, we interpret 'direct' to require that the harm to the victim be closely related to the scheme, rather than tangentially linked. Further, we interpret 'defendant's criminal conduct in the course of the scheme, conspiracy or pattern' to mean conduct that is both engaged in the furtherance of the scheme, conspiracy or pattern, and proscribed by the criminal statute the defendant was convicted of violating.") (fns. omitted), *cert. denied*, 519 U.S. 864, 117 S. Ct. 172 (1996); *United States v. Ledesma*, 60 F.3d 750, 751 (11th Cir. 1995) (restitution not appropriate where defendant convicted of attempting to export stolen cars; "the injury to the Mercedes' owner here was caused by the theft of the vehicle, not by [defendant's] subsequent attempt to export the stolen Mercedes. Because [defendant] was not convicted of stealing the Mercedes, he cannot be ordered to pay restitution for injury which resulted from the car's theft.").

C. *South Africa Did Not Suffer Any Losses Directly Caused by Defendants' Offense Conduct*

Defendants Arnold Bengis and Jeffrey Noll plead guilty to violating the Lacey Act, 16 U.S.C. § 3372(a)(2)(A), conspiracy to violate the Lacey Act, 18 U.S.C. § 371, and conspiracy to smuggle, 18 U.S.C. § 545. *See United States v. Bengis*, 03 Crim. 0308, 2006 WL 3735654 at *1 (S.D.N.Y. Dec. 19, 2006) (Peck, M.J.), *report & rec. adopted*, 2007 WL 241370 (S.D.N.Y. Jan. 29, 2007) (Kaplan, D.J.). Defendant David Bengis plead guilty to a misdemeanor charge of conspiracy to violate the Lacey Act, 18 U.S.C. § 371.[6] *See United States v. Bengis*, 2006 WL 3735654 at *1.

As the Court already ruled in connection with the MVRA, *see United States v. Bengis*, 2006 WL 3735654 at *3, while defendants' Lacey Act violations cannot independently form the basis for restitution under the VWPA because they are not crimes under Title 18 of the United States Code, the Court is authorized to order restitution under the VWPA based on defendants' related

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6. The VWPA provides that in the case of a misdemeanor, a court may order restitution "in lieu of any other penalty authorized by law." 18 U.S.C. § 3663(a)(1)(A) (quoted at page 2 above). As a result of his misdemeanor guilty plea, David Bengis was sentenced to twelve months imprisonment and forfeiture of $1.5 million to the United States. *See United States v. Bengis*, 2006 WL 3735654 at *2. This appears to mean that David Bengis is ineligible for restitution under the VWP A. However, because defendants have not raised this issue, and because the Court recommends denial of restitution for all defendants under the VWPA for other reasons, the Court does not reach this issue.

conspiracy pleas under 18 U.S.C. § 371. *See, e.g., United States v. Cummings*, 189 F. Supp. 2d 67, 73 (S.D.N.Y. 2002) ("Although the objects of the conspiracy to which [defendant] pleaded guilty do not independently authorize restitution, since 'conspiracy is a crime distinct from its underlying predicate acts and purposes, and involves additional harms,' restitution may be awarded for a violation of the conspiracy statute even when it could not be awarded for the underlying predicates.") (quoting *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991), *cert. denied*, 502 U.S. 1091, 112 S. Ct. 1162 (1992)) (modifications omitted); *see also United States v. Bengis*, 2006 WL 3735654 at *3 (citing cases). Thus, defendants satisfy the VWPA requirement that they were convicted of an offense under Title 18. 18 U.S.C. § 3663(a)(1)(A).

The next question is whether South Africa is a "victim" under the VWPA. This Court has already held that "South Africa's status as a foreign sovereign does not preclude it from being a victim and thus qualifying for a restitution award." *United States v. Bengis*, 2006 WL 3735654 at *2 (citing *Pasquantino v. United States*, 544 U.S. 349, 365, 125 S. Ct. 1766, 1777 (2005)). The issue, however, is whether South Africa satisfies the VWPA's remaining definition of "victim," that is, that it was "directly and proximately harmed as a result of the commission of [the] offense." 18 U.S.C. § 3663(a)(2).

The Government suggests two ways that the Court could find that South Africa was directly and proximately harmed by defendants' conduct: (1) South Africa suffered a loss to its natural resources as a result of defendants' over-

fishing of lobster in its waters (Gov't VWPA Br. at 8-10); and (2) South Africa suffered a loss because it was denied the right to seize and sell the lobster that was over-fished (Gov't VWPA Br. at 10-11). Both of the Government's loss theories thus are based upon the overfishing of lobster in South African waters.

> The conspiracy statute to which defendants plead guilty states that:
>
> > If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
> >
> > If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371. The underlying Lacey Act violation to which Arnold Bengis and Jeffrey Noll plead guilty states that: "It is unlawful for any person - ... to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce - ... any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign

law." 16 U.S.C. § 3372(a)(2)(A). The smuggling statute to which Arnold Bengis and Jeffrey Noll plead guilty states in part that:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or
>
> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law - -
>
> Shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 545.

The overfishing of lobster in South African waters is not "directly related" to defendants' criminal conduct under any of these statutes. First, under the conspiracy statute, the proscribed underlying conduct includes offenses against or defrauding the *United States*, which

certainly cannot be meant to include the overfishing of lobster in *South African* waters. Similarly, under the Lacey Act, overfishing is not an element of the offense. Indeed, it is "irrelevant" to their Lacey Act convictions whether defendants could be liable under South Africa's regulations. *See United States v. Lee*, 937 F.2d 1388, 1393 (9th Cir. 1991) ("The [Lacey] Act's criminal penalty provision does not require that the fishermen violated the regulation, but only that they took part in importing the [fish] when they knew, or should have known, that the [fish] had been taken in violation of the regulation."), *cert. denied*, 502 U.S. 1076, 112 S. Ct. 977 (1992). Lastly, while the smuggling statute forbids receiving, concealing, buying, selling, and transporting merchandise that has "been imported or brought into the United States contrary to law," to be convicted under that statute, defendants need not also have breached the underlying importation or invoicing law. *See* 18 U.S.C. § 545.

Because the overfishing of lobster cannot be said to be "directly related" to any of the required criminal conduct under the statutes to which defendants plead guilty, restitution is inappropriate in this case. *See, e.g., United States v. Reynolds*, 432 F.3d 821, 823 (8th Cir. 2005) (Defendant plead guilty to making a willful threat of harm by telephone, and around the same time of defendant's threatening call, the call recipient's residence and 250 bales of hay were destroyed by fire. Restitution denied under VWPA because "restitution may be awarded only for the amount of loss caused by the threatening phone call ... which was zero."); *United States v. Blake*, 81 F.3d 498, 506-07 (4th Cir. 1996) (Defendant plead guilty to *using* stolen credit cards, and government sought restitution to

be paid to the robbery victims based on the replacement costs for wallets and pocketbooks. The Fourth Circuit denied restitution under the VWPA, holding that "[t]he specific conduct underlying these elements, and thus forming the basis for [defendant's] offense of conviction, does not include the theft of the credit cards. Nor does the offense include as an element a scheme, conspiracy, or pattern of criminal activity that encompasses such conduct. As a result, the loss to the robbery victims was not caused by [defendant's] offense of conviction."); *United States v. Broughton-Jones*, 71 F.3d 1143, 1148-49 (4th Cir. 1995) (Where defendant was involved in illegal financing scheme that defrauded a victim of $25,000, but where defendant plead guilty only to perjury charge, $25,000 restitution order was unauthorized because defendant's offense conduct included only perjury, which does not have a victim. The court noted that "[a]lthough there is a factual connection between [defendant's] perjury and her alleged financing scheme, that connection is legally irrelevant. We conclude that *Hughey* and the text of the VWPA do not allow us to stretch the 'offense' involved in a perjury conviction to include any other conduct, whether or not the subject of separate conviction, to which the defendant's perjurious statement may have borne some relationship."); *United States v. Ledesma*, 60 F.3d 750, 751 (11th Cir. 1995) (Defendant pled guilty to attempting to export stolen cars. Restitution under VWPA reversed because "the injury to the Mercedes' owner here was caused by the theft of the vehicle, not by [defendant's] subsequent attempt to export the stolen Mercedes. Because [defendant] was not convicted of stealing the Mercedes, he cannot be ordered to pay restitution for injury which resulted from the car's theft.").

Here, as in *Ledesma*, defendants were convicted of conspiracy to import lobster into the United States contrary to United States law. (*See* page 9 above.) The illegal importation of the fish into the United States did not directly harm South Africa; the over-fishing in South Africa may have harmed South Africa (more on that below), but like the theft of the Mercedes in *Ledesma*, that was not the crime to which defendants pled guilty. *See also United States v. Bengis*, 2006 WL 3735654 at *8-9 (discussing "Arab boycott" hypothetical). South Africa was not "directly and proximately harmed" as a result of the crimes to which defendants pled guilty.

D. *The Government's Loss Calculation Methods Confirm That South Africa Is Not A Direct Victim of Defendants' Crimes*

The Government's loss calculation methods underscore the conclusion that South Africa was not a direct "victim" in this case as defined by the VWPA.[7]

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7. Indeed, even if restitution could be ordered for defendants' conduct, the deficiencies in the Government's restitution theories *alone* would cause the Court to recommend denial of restitution. The burden of proving the amount of restitution is on the Government. 18 U.S.C. § 3664(e) ("The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government."); *see, e.g., United States v. Reifler*, 446 F.3d 65, 122 (2d Cir. 2006); *United States v. Balint*, 133 Fed. Appx. 802, 806 (2d Cir. 2005); *United States v. Lynn*, 85 Fed. Appx. 267, 269 (2d Cir. 2004); *United States v. Gelb*, 944 F.2d 52, 56 (2d Cir. 1991). The Government's proffered damage theories do not satisfy that burden.

Appendix C

The Government submits two possible methods for calculation of restitution amounts in this case, prepared by one of the Government's experts, Ocean and Land Resource Assessment Consultants ("OLRAC"): OLRAC Method I and OLRAC Method II. (*See* Defs. Binder Ex. 11: Gov't Rec. Concerning Restitution at 5-18 & Ex. A thereto: OLRAC Revised Report, 12/22/04.) OLRAC Method I "effectively focuses on the cost of remediation, asking ... what it would cost South Africa to restore the rock lobster fishery to the level it would have been had the defendants not engaged in overharvesting." (Gov't Rec. Concerning Restitution at 6.) OLRAC Method II "focuses on the market value of the overharvested fish. It calculates the quantity of fish overharvested for each year, and multiplies that quantity by the prevailing market price." (Gov't Rec. Concerning Restitution at 7-8.)

There are several flaws with using either of these calculation methods here. First, both methods clearly rely on the notion that the overharvested lobster was property that belonged to South Africa, which is directly contrary to the Court's previous ruling in this case, as well as the opinion of the Government's own experts. *See United States v. Bengis*, 03 Cr. 0308, 2006 WL 3735654 at *6-9 (S.D.N.Y. Dec. 19, 2006) (Peck, M.J.), *report & rec. adopted*, 2007 WL 241370 (S.D.N.Y. Jan. 29, 2007) (Kaplan, D.J.). Additionally, OLRAC Method II specifically relies on the idea that South Africa had a property interest in the lobster based on its right to seize and sell the overharvested lobster on the open market, which also was specifically rejected by this Court in its prior ruling. *United States v. Bengis*, 2006 WL 3735654 at *7. Because South Africa had no property interest in

the lobster that defendants conspired to illegally import, these methods cannot show that South Africa was directly or proximately harmed by defendants' conduct, much less the appropriate dollar amount of restitution that should be ordered.

Second, OLRAC Method I does not rely on any loss that South Africa actually sustained; instead, the losses are hypothetical, based on costs South Africa *could* incur to restore lobster populations to their original level. *United States v. Quarrell*, 310 F.3d 664, 680 (10th Cir. 2002) ("A restitution order must be based on *actual* loss .... [T]he government is entitled to restitution based on its actual loss, not on the cost of a hypothetical excavation."). Indeed, it appears from the record that despite the passage of time , South Africa has not taken any action to replenish the lobster resources, and indeed has increased, rather than decreased, the total allowable catch of lobster for the industry. (*See* Defs. Binder Ex. 12: 1/31/05 Defs. Supp. Expert Reports Br. at 3.) Moreover, because South Africa has the power to regulate the amount of lobster taken by the fishing industry, it could restrict fishing in order to replenish the natural resource, without any cost to the South African government. During a conference with Judge Kaplan, the Government stated that the proper goal of the restitution would be to "get South Africa back to the position it would be in had there not been this massive overharvesting," and suggested that a proper way of doing so would be for South Africa to "pay the various competitors not to fish for a series of years" so that lobster population could "bounce back." (Gov't Binder Ex. H: Dkt. No. 103: 5/20/05 Conf. Tr. at 32; *see also* Gov't Rec. Concerning Restitution at 6, discussing Method I as

"the cost that South Africa theoretically would incur if it forced members of the fishing industry to cease fishing (for example, by paying them not to fish).") In response, Judge Kaplan suggested that South Africa could replenish the lobster population by simply forbidding any fishing of lobster for a certain amount of time. (5/20/05 Conf. Tr. at 32.)[8] The Government responded: "I think under those circumstances, under the OLRAC method, which is contrary to the OLRAC method, I think if there was no cost, absolutely no cost regardless of how you value it, I think the answer there would be that restitution would be zero." (5/20/05 Conf. Tr. at 33-34.) Judge Kaplan responded: "So do I." (5/20/05 Tr. 34.) Additionally, the Government's suggestion that South Africa might have to pay Hout Bay's competitors not to fish leads the Court to conclude that it is really the competitors who sustained a direct loss, not South Africa, again demonstrating that South Africa was not a direct victim of defendants' crimes. (*See* Gov't Rec. Concerning Restitution Ex. A: 12/22/04 OLRAC Rev. Report at 4: "Method I estimates damage as the amount of catch that the [*fishing*] *industry* has to now forfeit in order to restore the resource to the size that it would otherwise be ... " (emphasis added).)[9]

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8. *Cf.* Paul Greenberg, *Ocean Blues*, N.Y. Times, May 13, 2007, at 613 ("[S]cientists are finding that one of the best ways to manage fish is simply to leave them alone. Even when a population has been trawled for years, in most cases if you exempt it from fishing for a while, it will recover.").

9. The Government asserts that "South Africa also has the power to *sell* fishing rights." (Gov't VWPA Reply Br. at 14.) If the South African Government did sell fishing rights, its loss could be measured appropriately by lost revenue if it did not sell fishing

Accordingly, through the use of OLRAC Methods I and II, the Government has not shown that South Africa has suffered any direct or proximate harm as a result of defendants' conduct. The Government has not met its burden of proving the amount of loss for restitution purposes. Therefore, even if defendants' breach of South Africa's regulatory laws could be considered part of defendants' criminal conduct, the Government has not shown that South Africa has incurred any loss that would make it a true and direct "victim."

CONCLUSION

For the reasons discussed above, the Court should deny the Government's request for restitution under the Victim and Witness Protection Act.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1), the parties shall have ten (10) business days from service of this Report to file written objections. Such objections (and any responses

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rights for one or more years, in order to allow replenishment of the lobster population. But South Africa does not sell fishing rights, but rather establishes fishing quotas (Gov't VWPA Reply Br. at 14), and there is no information in the extensive record to indicate that it charges any fees for fishing rights. The Government's hypothetical (and its similar example of South Africa selling fishing rights to a single company, Gov't VWPA Reply Br. at 13-14) suffers from being a hypothetical contrary to fact, and thus cannot support a restitution award to South Africa.

to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Lewis A. Kaplan, 500 Pearl Street, Room 1310, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Kaplan (with a courtesy copy to my chambers). Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993), *cert. denied*, 513 U.S. 822, 115 S. Ct. 86 (1994); *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir.), *cert. denied*, 506 U.S. 1038, 113 S. Ct. 825 (1992); *Small v. Secretary of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 57-59 (2d Cir. 1988); *McCarthy v. Manson*, 714 F.2d 234, 237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: New York, New York
May 17, 2007

/s/
Andrew J. Peck
United States Magistrate Judge

Copies to: Marcus A. Asner, Esq.
Barry A. Bohrer, Esq.
Frederick P. Hafetz, Esq.
Frank H. Wohl, Esq.
Judge Lewis A. Kaplan

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 29, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 Crim. 0308 (LAK)

UNITED STATES OF AMERICA,

-against-

ARNOLD MAURICE BENGIS,

Defendant.

ORDER

LEWIS A. KAPLAN, *District Judge.*

The government's request for restitution under the Mandatory Victims Restitution Act is denied, substantially for the reasons set forth in the report and recommendation of Magistrate Judge Andrew J. Peck, the government's objections to which are overruled. Should the government wish to press for restitution under the Victim and Witness Protection Act or otherwise, it shall brief the issues within twenty days of the date of this order. The defendants shall respond within fourteen days of the service of the government's application.

SO ORDERED.

Dated: January 29, 2007

/s/
Lewis A. Kaplan
United States District Judge

APPENDIX E — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED DECEMBER 19, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S1 03 Cr. 308 (LAK) (AJP)

UNITED STATES OF AMERICA,

Plaintiff,

-against-

ARNOLD MAURICE BENGIS, JEFFREY NOLL & DAVID BENGIS,

Defendants.

REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Lewis A. Kaplan, United States District Judge:

In 2004, defendants Arnold Bengis, Jeffrey Noll, and David Bengis pleaded guilty and were convicted of conspiracy and violations of the Lacey Act, resulting from a combined United States and South African investigation and prosecution of defendants' involvement in illegal

fishing activities in waters off the coast of South Africa. Defendants admitted that they and others affiliated with them caught large quantities of South African rock lobster in excess of their allowed quota, bribed South African officials to keep quiet regarding defendants' violations, and exported the majority of the fish to the United States, while making improper customs declarations upon entry into this country. Defendants were sentenced in 2004, but because of the complexity of the restitution issue, the Court deferred that issue with the parties' consent. (*See* fn.5 below.) On June 2, 2006, Judge Kaplan referred the restitution issues to me for a Report and Recommendation. *United States v. Bengis*, 03 Crim. 0308, 2006 WL 1524496 at *1-2 (S.D.N.Y. June 2, 2006).

For the reasons set forth below, the Court should reject the Government's request for restitution under the Mandatory Victims Restitution Act ("MVRA").[1]

FACTS

The South African Investigation

In June 2001, South Africa "seized a container loaded with fish that was directed to come into the United States." (Defs. Binder Ex. 8: Gov't 10/18/04 Opp. Br. Ex. J: 5/28/04

1. Should the Government then wish to pursue restitution against defendants under the discretionary Victim and Witness Protection Act ("VWPA"), the Government shall brief the issues with respect to the VWPA within twenty days of service of Judge Kaplan's decision. (*See also* pages 22-23 below.)

Sentencing Tr. ["S."] 8.)[2] The seizure was part of South Africa's investigation into actions by Arnold Bengis' fishing company, Hout Bay Fishing Industries (PTY) Ltd., and distribution company, Icebrand Seafoods, Inc., from the early 1980s onward. (S. 8-9.) The investigation ultimately resulted in a settlement approved by South Africa's Marine and Coastal Management division of the Department of Environmental Affairs. (S. 9.) Pursuant to the settlement, Arnold Bengis' company paid approximately $5.77 million in fines and forfeitures of vessels and loss of fishing rights (reportedly the highest fine ever in South Africa's fishing industry), and the fishing business was shut down, in exchange for the promise that South Africa would not further prosecute Arnold Bengis, Jeffrey Noll or David Bengis. (*See* S. 9-10, 13-15.) The United States and South African governments reportedly had an agreement relating to this investigation under which South Africa prosecuted only the South African fishing company, and the United States prosecuted only its individual owners. (S. 17-18, 45.)

Defendants' Guilty Pleas

On March 2, 2004, defendants Arnold Bengis and Jeffrey Noll plead guilty to Counts One, Eight, Nineteen and Twenty-One of the Superseding Indictment. (*See*

2. The Government and the defendants each provided me with a thick exhibit binder with material relevant to restitution issues that was previously submitted to Judge Kaplan – some of which is docketed, others of which, such as letters, is not – and for convenience, this Report and Recommendation cites to the material as found in those binders.

Appendix E

Defs. Binder Ex. 8: 10/18/04 Gov't Opp. Br. Ex. G: A. Bengis Plea Tr. at 2, 12-14; *id.* Ex. H: Noll Plea Tr. at 3, 11-13.)[3] Count One charged a conspiracy to violate the Lacey Act, 16 U.S.C. § 3372(a)(2)(A), and to commit smuggling, 18

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3. Arnold Bengis' allocution stated:

> THE COURT: Did you commit the offenses with which you have been charged?
>
> THE DEFENDANT: I did.
>
> THE COURT: Tell me in your own words what you did.
>
> THE DEFENDANT: Your Honor, from about April 2000 to in or about June 2001, in violation of the Lac[e]y Act, I participated in a scheme to import South African Rock lobster into the United States which I knew had been harvested and exported in violation of South African law. These rock lobsters entered in shipments which arrived in the United States in approximately July 10th, 2000; April 23rd, 2001; and June 5th 2001.

(A. Bengis Plea Tr. at 14.) Similarly, Noll's allocution stated:

Appendix E

U.S.C. § 545. (Gov't Binder Ex. A: Superseding Indictment at 21.) Counts Eight, Nineteen and Twenty-One charged substantive Lacey Act violations. (Superseding Indictment at 33, 38, 39.) On April 2, 2004, David Bengis plead guilty to a misdemeanor conspiracy charge under Count One of the Superseding Indictment. (*See* Defs. Binder Ex. 8: Gov't Opp. Br. Ex. I: D. Bengis Plea Tr.)[4]

THE DEFENDANT: From in about April 2000 to in or about June 2, 2001, in violation of the Lacey Act, I participated in a scheme to import South African rock lobster into the United States. Which I knew had been harvested and exported in violation of South African law.

This rock lobster entered in shipments which arrived in the United States on approximately July 10, 2000, April 23, 2001 and June 5, 2001.

(Noll Plea Tr. at 13.)

4. While all their plea agreements state that restitution "must" be ordered under §§ 3663, 3663A, defendants contend that restitution "must" be ordered "in accordance with law . . . [and] that the law does not permit the Court in these circumstances to enter an order of restitution based upon this record." (Gov't Binder Ex. H: 5/20/05 Conf. Tr. at 12.)

Appendix E

Sentencing

Defendants were sentenced by Judge Kaplan on May 28, 2004. Arnold Bengis and Jeffrey Noll each were sentenced to, *inter alia*, concurrent terms of forty-six months imprisonment for each of the four counts, forfeiture of $5.9 million to the United States, and restitution in an amount to be later determined. (Defs. Binder Ex. 8: Gov't 10/18/04 Opp. Br. Ex. J: S. 59-61.)[5] David Bengis was

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5. Under 18 U.S.C. § 3664(d)(5), the Court is required to determine a restitution amount within ninety days of sentencing. However, because of the complicated nature of the restitution issue, the parties agreed to waive the ninety-day period in the interest of having more time to prepare their arguments on this issue. (*See* Defs. Binder Ex. 2: 7/20/04 A.U.S.A. Asner Ltr. at 1; Defs. Binder Ex. 4: 7/26/04 Defense Counsel Rocco Ltr. at 2: "The defendants each agree, therefore, to waive the 90-day period which 18 U.S.C. § 3664(d)(5) generally prescribes for determining restitution.") The Second Circuit considers a restitution determination made more than ninety days after sentencing to be harmless error unless a defendant can show actual prejudice from the delay, *see, e.g.*, *United States v. Zakhary*, 357 F.3d 186, 193 (2d Cir.), *cert. denied*, 541 U.S. 1092, 124 S. Ct. 2833 (2004); *United States* v. *Catoggio*, 326 F.3d 323, 329-30 (2d Cir.), *cert. denied*, 540 U.S. 939, 124 S. Ct. 264 (2003); *United States v. Stevens*, 211 F.3d 1, 5 (2d Cir. 2000), *cert. denied*, 531 U.S. 1101, 121 S. Ct. 836 (2001). In addition, the ninety-day period can be equitably tolled. *See, e.g.*, *United States v. Dando*, 287 F.3d 1007, 1011 (10th Cir.), *cert. denied*, 537 U.S. 917, 123 S. Ct. 301 (2002); *United States v. Stevens*, 211 F.3d at 4-5. The Court notes that long periods of delay occurred in this case while the parties attempted to reach a settlement as to the amount of restitution. (*See, e.g.*, Gov't Binder Ex. H: 5/20/05 Conf. Tr. at 58-59; Gov't Binder Ex. I: 4/7/06 Conf. Tr. at 7-11; Gov't Binder Ex. J: 5/19/06 Conf. Tr. at 2-3.) Because the parties here

sentenced to, *inter alia*, twelve months imprisonment, forfeiture of $1.5 million to the United States, and restitution in an amount to be later determined. (S. 58, 60.)

The Government's most recent position is that defendants should be required to pay $39.7 million in restitution, to be paid to the Government of South Africa as the "victim" of defendants' crimes. (*See* Defs. Binder Ex. 11: Gov't 12/22/04 Restitution Br. at 1-2.)[6]

ANALYSIS

I. *THE MANDATORY VICTIMS RESTITUTION ACT*

The government seeks restitution primarily under the Mandatory Victims Restitution Act ("MVRA"), which makes restitution a mandatory part of sentencing for a specific set of crimes.[7] *See* 18 U.S.C. § 3663A. The MVRA

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jointly requested the delay in determining restitution, and because defendants are "unaware of any prejudice that will accrue to the defense as a result of delay in a determination of the restitution issue in this case" (7/26/04 Rocco Ltr. at 2 n.1), any delay in determining restitution in this case is, at most, harmless error.

6. The Government originally sought restitution of over $90 million. (*See, e.g.*, Gov't Binder Ex. C: 8/25/04 Kaplan Order at 1.)

7. Defendants originally contended that "the federal restitution scheme is unconstitutional" under *Blakely v. Washington*, 542 U.S. 296 , 124 S. Ct. 2531 (2004). (Defs. Binder Ex. 7: 9/15/04 Defs. Br. at 29-34.) However, subsequent to the parties' briefing on the issue, the Second Circuit rejected such a challenge:

states that "when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate." 18 U.S.C. § 3663A(a)(1). Section 3663A(c) states that:

> Although [the MVRA] makes the imposition of restitution mandatory for a defendant convicted of a felony covered by the MVRA, . . . the MVRA fixes no range of permissible restitutionary amounts and sets no maximum amount of restitution that the court may order. Thus, we conclude that the *Booker -Blakely* principle that jury findings, or admissions by the defendant, establish the 'maximum' authorized punishment has no application to MVRA orders of restitution.
>
> . . . .
>
> We thus reject the contentions of [defendants] that the orders requiring them to make restitution for loss amounts not admitted in their plea allocutions violated their rights under the Sixth Amendment as enunciated in *Booker*. We see no *Booker* error.

United States v. Reifler, 446 F.3d 65, 118-120 (2d Cir. 2006); *accord, e.g., United States v. Oladimeji*, 463 F.3d 152, 157 (2d Cir. 2006) ("We have now ruled in *Reifler* that, under the precedents set by *Apprendi*, *Blakely*, and *Booker*, the Sixth Amendment does not bar a district court from imposing a restitution order that is based on findings it has made by a preponderance of the evidence."); *United States v. Chen*, No. 04-6013-CR, 2006 WL 1766566 at *1 (2d Cir. June 27, 2006); *United States v. Kirk*, 180 Fed. Appx. 207, 209 (2d Cir.), *cert. denied*, 127 S. Ct. 545 (2006); *United States v. Castillo*, 186 Fed. Appx. 25, 27 (2d Cir. 2006).

(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense -

(A) that is -

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

18 U.S.C. § 3663A(c)(1).

A. ***The "Victim" of Defendants' Crimes***

Under the MVRA, "the term 'victim' means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal

activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663A(a)(2).

In its most recent submission to the Court, the Government clarified that "South Africa" is the sole victim for which it is seeking restitution. (6/30/06 A.U.S.A. Asner Ltr. at 2; *see also* Gov't Binder Ex. F: 7/24/04 Conf. Tr. at 4.)[8] South Africa's status as a foreign sovereign does not

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8. Defendants assert that at various prior times, the Government had contended that the "victim" was the people of South Africa, or both the people and Government of South Africa. *Compare, e.g.*, Defs. Binder Ex. 8: Gov't 10/18/04 Opp. Br. at 3 ("[T]he government of South Africa is entitled to claim restitution on behalf of its people, who suffered devastating losses to their natural resources directly attributable to defendants' poaching scheme."); *id.* at 11 ("both the people and the government of South Africa were" directly harmed by defendants' offense); *id.* at 13 ("Accordingly, the Government of South Africa is an appropriate entity to claim restitution on behalf of the people of South Africa."); *with, e.g.*, Defs. Binder Ex. 9: Defs. 10/28/04 Reply Br. at 2-3 ("The Government's inexplicable transformation of the victim from the Republic of South Africa to the people of South Africa as represented by the Government, is not mere semantics. To the contrary, it reflects an acknowledgment that the victim identified to the Court and the defendants [at the 7/27/04 conf., Tr. at 4] – the Republic of South Africa – did not suffer any independent pecunary loss and therefore was not entitled to restitution."); *& with* Defs. Binder Ex. 11: Gov't 12/22/04 Restitution Amount Br. at 3, 23-24 ("[W]hile the defendants would have the Court believe that there is a meaningful distinction for the purposes of restitution between (i) the Republic, (ii) the government and (iii) the people of South Africa, any such a philosophical distinction has no bearing on the [restitution] issue before the Court."). Judge

preclude it from being a victim and thus qualifying for a restitution award. *See Pasquantino v. United States*, 544 U.S. 349, 365, 125 S. Ct. 1766, 1777 (2005) (Canada qualified as a victim that could receive restitution under the MVRA; discussed further at pages 10-11 below).

B. *The Meaning of "Offense Against Property" under Title 18*

The Government argues that restitution is appropriate under the MVRA because the Government contends that defendants were convicted of offenses against property under Title 18 of the United States Code. (*See, e.g.*, Defs. Binder Ex. 8: Gov't 10/18/04 Opp. Br. at 9-10, 23-26.) Arnold Bengis and Jeffrey Noll pleaded guilty to one charge of conspiracy, 18 U.S.C. § 371, to violate the Lacey Act, 16 U.S.C. § 3372(a)(2)(A), and to commit smuggling, 18 U.S.C. § 545. (*See* pages 3-4 above.) In addition, Arnold Bengis and Jeffrey Noll pleaded guilty to three counts of substantive Lacey Act violations, 16 U.S.C. § 3372(a)(2)(A). (*See* pages 3-4 above.) David Bengis pleaded guilty to a misdemeanor conspiracy charge, 18 U.S.C. § 371, to violate the Lacey Act, 16 U.S.C. § 3372(a)(2)(A). (*See* page 4 above.)

Kaplan remarked: "Whether you call the people of South Africa the Government of South Africa, the Republic of South Africa, I have not from the beginning had the slightest doubt about what the [U.S.] government's position is. And my tentative impression that what the defendants are doing on that issue is seizing on every trivial variation in verbal formulation to say it's a whole new case. I don't see it is. Maybe I'm wrong. That's my impression." (Gov't Binder Ex. G: 1/13/05 Conf. Tr. at 3.)

Although violations of the Lacey Act do not independently trigger the MVRA restitution statute because they are not Title 18 violations, the conspiracy charge under 18 U.S.C. §371 can trigger the MVRA if the underlying act qualifies as an "offense against property." *See, e.g., United States v. Cummings*, 189 F. Supp. 2d 67, 73 (S.D.N.Y. 2002) ("Although the objects of the conspiracy to which [defendant] pleaded guilty do not independently authorize restitution, since 'conspiracy is a crime distinct from its underlying predicate acts and purposes, and involves additional harms,' restitution may be awarded for a violation of the conspiracy statute even when it could not be awarded for the underlying predicates.") (quoting *United States v. Helmsley*, 941 F.2d 71, 101 (2d Cir. 1991)) (modifications omitted); *see also, e.g., United States v. Quarrell*, 310 F.3d 664, 678 (10th Cir. 2002) ("Even though the statute does not explicitly refer to conspiracy, the MVRA applies to conspiracies when, as with fraud or deceit, their underlying purpose was an offense against property.").[9]

1. *Case Law Regarding "Offenses Against Property"*

It is an issue of first impression whether Lacey Act violations or smuggling violations are "offenses against

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9. *Compare United States v. Day*, 418 F.3d 746, 748, 753 n.5, 757 n.7 (7th Cir. 2005) (where defendant pleaded guilty to making false statements with respect to the actual mileage of a motor vehicle under Title 49, violation was an "offense against property," but not an offense against property under Title 18, and therefore restitution was not mandatory under the MVRA).

property" such as to trigger the MVRA where they were the underlying offenses to a Title 18 conspiracy conviction. Two Supreme Court cases, however, are informative as to the types of violations that can be considered "offenses against property" under the restitution statutes.

In *Pasquantino v. United States*, 544 U.S. 349, 353-54, 125 S. Ct. 1766, 1770-71 (2005), defendants were convicted of wire fraud in connection with their scheme to smuggle liquor into Canada to evade Canadian liquor taxes. Defendants challenged their convictions, arguing, among other things, that the government did not meet its burden to prove that the object of the wire fraud was "money or property." *Id.*, 544 U.S. at 355-57, 125 S. Ct. at 1771-72. The Supreme Court held that:

> Canada's right to uncollected excise taxes on the liquor petitioners imported into Canada is "property" in its hands. This right is an entitlement to collect money from petitioners, the possession of which is "something of value" to the Government of Canada. Valuable entitlements like these are "property" as that term ordinarily is employed. Had petitioners complied with this legal obligation, they would have paid money to Canada. Petitioners' tax evasion deprived Canada of that money, inflicting an economic injury no less than had they embezzled funds from the Canadian treasury. The object of petitioners' scheme was to deprive Canada of money legally due, and their scheme thereby had as its object the

> deprivation of Canada's "property." . . . The fact that the victim of the fraud happens to be the government, rather than a private party, does not lessen the injury.

Pasquantino v. United States, 544 U.S. at 355-56, 125 S. Ct. at 1771-72 (citations omitted). The Supreme Court in *Pasquantino* found that restitution was required under the MVRA, since the wire fraud was an offense against property. *Pasquantino v. United States*, 544 U.S. at 365, 125 S. Ct. at 1777 (citations omitted).

The Supreme Court in *Pasquantino* contrasted its decision with its earlier decision in *Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365 (2000), as follows:

> Our conclusion that the right to tax revenue is property in Canada's hands, contrary to petitioners' contentions, is consistent with *Cleveland*, *supra*. In that case, the defendant, Cleveland, had obtained a video poker license by making false statements on his license application. We held that a State's interest in an unissued video poker license was not "property," because the interest in choosing particular licensees was "'purely regulatory'" and "[could not] be economic." We also noted that "the Government nowhere allege[d] that Cleveland defrauded the State of any money to which the State was entitled by law."
>
> *Cleveland* is different from this case. Unlike a State's interest in allocating a video

> poker license to particular applicants, Canada's entitlement to tax revenue is a straightforward "economic" interest. There was no suggestion in *Cleveland* that the defendant aimed at depriving the State of any money due under the license; quite the opposite, there was "no dispute that [the defendant's partnership] paid the State of Louisiana its proper share of revenue" due. Here, by contrast, the Government alleged and proved that petitioners' scheme aimed at depriving Canada of money to which it was entitled by law. Canada could hardly have a more "economic" interest than in the receipt of tax revenue. *Cleveland* is therefore consistent with our conclusion that Canada's entitlement is "property" as that word is used in the wire fraud statute.

Pasquantino v. United States, 544 U.S. at 356-57, 125 S. Ct. at 1772 (citations omitted).

In the Second Circuit and in this District, the vast majority of cases where restitution has been ordered under the MVRA subsection relating to "offenses against property" involved financial crimes.[10] Indeed, in *United*

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10. *See, e.g.*, *United States v. Boccagna*, 450 F.3d 107, 112 (2d Cir. 2006) (where defendant was convicted of making false statement to federally insured lending institution, 18 U.S.C. § 1014, thereby obtaining millions of dollars in government-insured mortgage loans, violation was "offense against property" under Title 18 that mandated restitution under the MVRA; defendant did "not dispute that his fraud crime of conviction falls within the MVRA mandate"); *United States v. Reifler*, 446 F.3d 65,

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121, 139 (2d Cir. 2006) (where defendants were convicted of conspiracy to commit RICO fraud-related offenses in connection with investment of pension funds and manipulation of securities prices, each violation was an "offense against property" under Title 18 such that restitution under MVRA was mandatory, but remand ordered re complexity exception); *In re W.R. Huff Asset Mgmt. Co.* (*U.S. v. Rigas*), 409 F.3d 555, 563-64 (2d Cir. 2005) (where defendants were convicted of securities fraud, conspiracy to commit securities fraud, false statements in SEC filings, and bank fraud, each violation was an "offense against property" under Title 18 sufficient to trigger MVRA restitution, but complexity exception applied); *United States v. Ekanem*, 383 F.3d 40, 42 (2d Cir. 2004) (where defendant was convicted of embezzlement of federal funds and intentional misapplication of those funds, violations were "offenses against property" under Title 18 sufficient to trigger the MVRA); *United States v. Catoggio*, 326 F.3d 323, 326 (2d Cir. 2003) (where defendant plead guilty to one count of racketeering in relation to a complex securities fraud scheme, restitution mandatory under the MVRA); *United States v. Maurer*, 226 F.3d 150, 151-52 (2d Cir. 2000) (upholding mandatory restitution order under MVRA where defendant was convicted of wire and bank fraud); *United States v. Boyd*, 222 F.3d 47, 49-50 (2d Cir. 2000) (upholding mandatory restitution order under MVRA where defendant was convicted of mail fraud and wire fraud from the sale of gems at inflated prices); *United States v. Ismail*, 219 F.3d 76, 77 (2d Cir. 2000) (where defendant plead guilty to bank embezzlement, restitution was mandatory under MVRA); *United States v. Jaffe*, 314 F. Supp. 2d 216, 223 (S.D.N.Y. 2004) (where defendant plead guilty to violating 18 U.S.C. § 1014 for making false statements to influence the lending determinations of a federally insured bank and thereby obtaining $20 million, restitution was mandatory under MVRA), *aff'd*, 417 F.3d 259 (2d Cir. 2005); *United States v. Nachamie*, 121 F. Supp. 2d 285, 297 (S.D.N.Y. 2000) (where defendants were convicted of, *inter alia*, conspiracy to defraud Medicare, violations were "offenses against

Appendix E

States v. Cummings, 189 F. Supp. 2d 67, 73-75 (S.D.N.Y. 2002), Judge Cote engaged in a lengthy discussion of what offenses can be considered "offenses against property" under the MVRA, many of which included financial crimes. Judge Cote analyzed the holdings of several Second Circuit MVRA cases and concluded that an "offense against property" means an offense against "tangible property," including money. *United States v. Cummings*, 189 F. Supp. 2d at 74. Judge Cote concluded:

> In sum, consistent with the presumption that an "offense against property" is an offense against tangible property, all of the restitution awards under Section 3663A that have been affirmed by the Second Circuit have involved the theft of money, a form of tangible property.
>
> It would appear, therefore, that Section 3663A would also apply to counts one and ten to the extent they relate to the efforts to defraud Chase [Bank] and to the making of false statements to Chase in connection with Aurora's credit application. The remaining objects of Count One's conspiracy charge - securities fraud, filing false documents with the SEC, falsifying Aurora's books and

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property" sufficient to trigger restitution under the MVRA), *aff'd*, 5 Fed. Appx. 95 (2d Cir. 2001); *United States v. Harris*, 60 F. Supp. 2d 169, 176 (S.D.N.Y. 1999) (where defendant was convicted of wire and bank fraud, money laundering, and conducting a continuing financial crimes enterprise, each violation was an "offense against property" under the MVRA).

> records, and making misleading statements to Aurora's auditors - do not relate sufficiently to wrongdoing in connection with tangible property to trigger coverage by Section 3663A [*i.e.*, the MVRA].

United States v. Cummings, 189 F. Supp. 2d at 74-75.

The Government relies on *United States v. Quarrell*, 310 F.3d 664, 677-78 (10th Cir. 2002), in which the Tenth Circuit dealt with another example of tangible property. In *Quarrell*, defendants were convicted of violating the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. §§ 470ee(a), and conspiring to violate ARPA pursuant to 18 U.S.C. § 371. *United States v. Quarrell*, 310 F.3d at 668. ARPA's primary purpose is to protect "archaeological resources and sites which are on public lands and Indian lands." 16 U.S.C. § 470aa(b). The specific ARPA violation of which defendants were convicted states that:

> "No person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit . . ."

United States v. Quarrell, 310 F.3d at 670 (quoting 16 U.S.C. § 470ee(a)). The district court ordered the defendants to pay restitution to the government pursuant to the MVRA. *United States v. Quarrell*, 310 F.3d at 676.

On appeal, defendants argued, among other things, that their conspiracy to violate ARPA was not an "offense against property." *United States v. Quarrell*, 310 F.3d at 677-78. The Tenth Circuit held that conspiracy to violate ARPA was an offense against property, stating that the defendants "conspired to illegally excavate public land, they knew the objective of driving and hiking to the East Fork site was to excavate the land, and they knowingly and voluntarily excavated and damaged the land. The underlying predicate acts and purposes that constituted the conspiracy were an offense against property." *United States v. Quarrell*, 310 F.3d at 678.

2. *Defendants' Underlying Acts*

The specific underlying Lacey Act violation to which Arnold Bengis and Jeffrey Noll plead guilty states that: "It is unlawful for any person – . . . to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce – . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law." 16 U.S.C. § 3372(a)(2)(A). The South African laws that Arnold Bengis and Jeffrey Noll violated which provided the basis for the Lacey Act violations were described in the Superseding Indictment as follows:

> a. The Customs and Excise Act (Act No. 91 of 1964), Ch. X, § 84(1) (which makes it an offense knowingly to provide false statements to the South African customs authorities);

b. The Marine Living Resources Act (Act No. 18 of 1998), §§ 13(1), 58(1)(a)(i) (which together make it an offense to harvest, process, or possess fish without a permit);

c. The following regulations under the Marine Living Resources Act (Act No. 18, 1998): Ch. 5, Part 1, § 27(1)(c) (which makes it an offense to transship or transfer at sea any fish without a permit); § 27(f) (which makes it an offense to export fish from South Africa without a permit); Ch. 5, Part 8, § 44(1) (which makes it an offense to fish, collect, keep, control, store, transport or possess any rock lobster, except on authority of a permit); Ch. 5, Part 11, § 54 (which makes it an offense to fish, collect, land, sell or possess certain prohibited species (including Patagonia toothfish) without a permit); and Ch. 9, § 85(2) (which makes it an offense to transship or transfer at sea any fish or fish products without the supervision of a fishery control officer or other authorized person); and

d. The Catch Documentation Scheme for *Dissostichus* spp. of the Commission for the Conservation of Antarctic Marine Living Resources.

(Gov't Binder Ex. A: Superseding Indictment at 22-23.)

The specific underlying smuggling violation to which Arnold Bengis and Jeffrey Noll plead guilty reads in part:

Appendix E

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or
>
> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law –
>
> Shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 545.

3. ***Analysis of Defendants' Underlying Acts***

a. **South Africa Did Not Have A Property Interest In The Fish Defendants Took From Its Waters**

Defendants' actual taking of the fish from South African waters was not an offense against property

against the Government's designated victim, South Africa, because under South African law, South Africa does not own the wildlife in its waters and therefore had none of its "property" taken by defendants. The opinion of Marius Diemont of South Africa's Department of Marine and Coastal Management states that South Africa's Marine Living Resources Act ("MLRA"), 1996 (No. 18 of 1996), provides that: "control of all marine living resources vests exclusively in the South African Government." (Defs. Binder Ex. 3: Diemont Expert Opinion ¶¶ 7, 14.) The purpose of that control is regulatory: to "promote conservation by slowing down the reduction or depletion of the fishery due to overcatching." (*Id.* ¶ 5.) Mr. Diemont's opinion continues, stating: "It is to be noted that neither the [South African] Constitution nor the MLRA vests ownership of marine resources in the State. The reason for this is that South African common law (Roman-Dutch law) regards fish as *res nullius* (things belonging to no one) but once they are caught and appropriated, they become the property of the person who caught them." (*Id.* ¶ 15; *accord*, Defs. Binder Ex. 3 Ex. A: Marcus-Chaskalson Expert Opinion ¶¶ 5, 7, 11, 13.) The Government's experts admit that South Africa does not own the fish but is "custodian" for the country's benefit. (Defs. Binder Ex. 8 Ex. A: Glazewski Expert Opinion ¶ 9 ("I am of the view that while the South African government is not the owner of the illegally captured fish, it is the custodian of the nation's fish resources under the doctrine of the Public Trust . . . "); Defs. Binder Ex. 8 Ex. B: Goldblatt-Stein Expert Opinion ¶¶ 3.11, 3.12 ("We do not contend that ownership of ambient fish rests in the State. We do argue that the State has acquired and enjoys residual rights and duties in respect

of such fish. . . . The fact that the State does not claim ownership rights over fish in South African waters . . . does not mean that the State surrenders or abrogates its rights, claims and duties to control fishing activity in its waters.").)[11] Clearly, even the Government's experts are referring to South Africa's regulatory powers. Therefore, unlike the situation in *United States v. Quarrell*, 310 F.3d 664, 677-78 (10th Cir. 2002), in which defendants stole or damaged tangible property actually owned by the U.S. government, the South African government had no property interest in the fish that defendants took from South African waters; it merely had a regulatory interest, similar to that involved in *Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365 (2000).[12]

An appropriate analogy is to compare South Africa's MLRA to regulation of air emissions from smokestacks. While a government has regulatory power over the amount of noxious emissions that smokestacks can emit, a government clearly has no ownership or property

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11. Judge Kaplan stated: "Now, if the South African law experts established one thing before me, it is that South Africa did not own these fish in that sense," to which the AUSA responded, "I agree that South Africa did not own the fish in fee simple absolute." (Gov't Binder Ex. H: 5/20/05 Conf. Tr. at 36-37.)

12. Judge Kaplan recognized this distinction in a prior conference in this case, stating: "[O]nce you get past the proposition that the South African government owns these creatures, what you're left with is an argument that South Africa was harmed because its interest in regulating the exploitation of the resource was undermined." (Gov't Binder Ex. H: 5/20/05 Conf. Tr. at 31; *see also id.* at 32-33.)

interest in the air in the atmosphere or the emissions from a smokestack. Similarly, while South Africa clearly has regulatory power over how fishing companies operate in South African waters, under its own laws it has no ownership or property interest in the wildlife that lives in those waters.

The Supreme Court has discussed the issue of ownership of wild animals:

> In any event, "(t)o put the claim of the State upon title is," in Mr. Justice Holmes' words, "to lean upon a slender reed." . . . A State does not stand in the same position as the owner of a private game preserve and *it is pure fantasy to talk of "owning" wild fish*, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. . . . The "ownership" language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." . . . Under modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.

Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284-85, 97 S. Ct. 1740, 1751-52 (1977) (citations omitted & emphasis

added). The Supreme Court thus recognized that a government does not have a property right in wild fish, but that government can regulate wildlife through its regulatory police power. That is the situation here. Thus, the defendants' offenses do not constitute an "offense against property," but involve South Africa's regulatory power, as in *Cleveland v. United States.*

Diemont's opinion goes on to advance the further theory that South Africa ultimately had ownership rights to the illegally caught fish because South Africa had the right to receive a forfeiture of the fish from defendants. (Diemont Opinion ¶¶ 18-21; *see also* Defs. Binder Ex. 8: Gov't 12/18/04 Opp. Br. at 23, 26-27.) The fact that South Africa could have forfeited all the fish that defendants caught illegally does not transform defendants' acts of over-fishing into offenses against South Africa's property. It is commonplace for criminal defendants to be required to forfeit the proceeds or instrumentality of their crime to the government. It is illogical to say, however, that the government has a property interest in every object that may be the proceeds or instrumentality of a crime *prior* to that object being forfeited. And here, the fish imported into the United States had never been ordered forfeited by the South African government in South African criminal (or other) proceedings. *Cf. Cleveland v. United States*, 531 U.S. at 15, 121 S. Ct. at 368 ("It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim."). Defendants' acts of taking fish from South African waters that the South African government did not own, but could have (but in fact did not) forfeit does not

provide the basis for any offenses against South African property that would trigger restitution under the MVRA.

b. South Africa Did Not Have A Property Interest In Any Tax Or Other Form Of Revenue As A Result Of Its Conservation Regulatory Laws

Defendants' violations of various regulations under South Africa's Customs and Excise Act, MLRA, and Catch Documentation Scheme do not provide the basis for any underlying offenses against South African property. The bulk of defendants' violations were regulatory permit violations, with additional violations of false statements to officials under the Customs and Excise Act. (*See* page 15 above.) None of these violations rise to the level of "offenses against property" against South Africa because they are pure regulatory violations and do not involve any sort of property interest belonging to South Africa.

As in *Cleveland v. United States*, 531 U.S. 12, 121 S. Ct. 365 (2000), where the state's interest was in the allocation of video poker licenses, here, defendants' violations amount to breaches of a licensing scheme in which South Africa's interest was in the allocation of fishing permits. *See Cleveland v. United States*, 531 U.S. at 20, 121 S. Ct. at 371 ("To begin with, we think it beyond genuine dispute that whatever interests Louisiana might be said to have in its video poker licenses, the State's core concern is *regulatory*."). Unlike the Canadian tax laws in *Pasquantino v. United States*, 544 U.S. 349, 355-57, 125 S. Ct. 1766, 1771-72 (2005), where the Supreme Court

found that the Canadian government held a property interest in the substantial liquor tax revenue that defendants avoided paying as a result of their smuggling scheme, the South African laws that provide the basis for defendants' underlying violations here involve no type of taxes or significant revenue for South Africa.[13] Therefore, defendants' violations of these South African regulations also do not constitute "offenses against property" that would trigger restitution under the MVRA.

Similarly, defendants' Lacey Act and smuggling violations do not create any property interest for South Africa that could be the basis of an offense against property. The Lacey Act and the smuggling statute under which defendants were prosecuted in the United States also are regulatory in nature. (*See* pages 14-16 above.) "The purpose of the Lacey Act is to protect 'those species of fish and wildlife whose continued existence is presently threatened' by 'gradually drying up the international market for endangered species,' thus 'reducing the poaching of any such species in the country where it is

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13. As defendants stated in their brief opposing restitution:

> If South Africa is entitled to anything in restitution, it might be permitted to recover the losses in revenue from such things as taxes and duties. But the government does not address restitution on that basis. . . .

(Defs. Binder Ex. 7: 9/15/04 Defs. Br. at 2; *see also id.* at 12 & n.4: South Africa "charged nothing more than nominal fees for those [fishing] permit[s].")

found.'" *United States v. Bernal*, 90 F.3d 465, 467 (11th Cir. 1996). The Lacey Act was enacted for regulatory purposes, not to create a source of tax or licensing revenue for the U.S. or foreign governments. Defendants' violations of the Lacey Act and the smuggling statute do not provide the basis for any South African property interest which would trigger restitution under the MVRA.

The Government suggests that this case involved offenses against South African property because defendants' actions of overfishing in South African waters "had a devastating impact on South Africa's rock lobster population." (*E.g.*, Defs. Binder Ex. 8: Gov't 10/18/04 Opp. Br. at 1.) However, as discussed above, the violations that served as underlying violations to defendants' conspiracy, Lacey Act, and smuggling violations were purely regulatory violations. The South African statutes that served as the basis of defendants' convictions did not address any actual theft of property or destruction of property; they were simply regulatory permit violations. The Government is essentially arguing that because the regulatory violation resulted in destruction of property, the regulatory violation is transformed into an offense against property.

The following analogy demonstrates why the Government's position is incorrect: Assume that the Arab states' former ban on trade with Israel was still in place and, because the United States is Israel's ally, was extended to also ban trade with the United States. If a person legally caught fish or wildlife in an Arab state, and then illegally imported that fish or wildlife to the United

States in violation of the Arab trade ban, that person would be in violation of the Lacey Act, because that person would have imported fish or wildlife sold in violation of foreign law. The underlying violation is clearly a purely regulatory violation that is not an offense against property; rather, it is an offense against the foreign state's foreign policy. Even if the original, legal taking of the fish or wildlife in the Arab state resulted in a depletion of that type of fish or wildlife in that Arab State, the underlying offense to the Lacey Act would not be an offense against property because the offense is against the Arab state's foreign policy of no trade with Israel and the United States, not an offense against the Arab state's property.

Such is the situation with defendants' violations here: the underlying violations that triggered the Lacey Act, violation of South African permit rules, were purely regulatory and not property offenses. While defendants' regulatory offenses may have resulted in the depletion of lobster in South African coastal waters, that similarly does not transform the underlying South African permit violations into offenses against property in which South Africa was the victim. As discussed above, South Africa had no property interest in the fish that defendants took from South African waters and South Africa had no property interest in any tax or other form of revenue as a result of defendants' breach of South Africa's conservation regulatory laws. Defendants' offenses therefore are not offenses against property under Title 18 and therefore do not trigger restitution under the MVRA. Accordingly, the Court should reject the Government's request for restitution under the MVRA.

Appendix E

II. *THE VICTIM AND WITNESS PROTECTION ACT*

It is possible that, even though restitution is not appropriate under the MVRA, restitution may be appropriate under the Victim and Witness Protection Act ("VWPA"), the federal discretionary restitution statute. 18 U.S.C. §3663. However, because the parties have primarily focused on the MVRA, and because the VWPA requires the Court to take into account slightly different considerations than the MVRA, this Court will not reach the argument regarding whether restitution is appropriate under the VWPA at this time. If Judge Kaplan were to reject this Report and Recommendation and find that the MVRA does apply, it will be unnecessary to reach the VWPA.[14] On the other hand, should Judge Kaplan adopt this Report and Recommendation, the Government, if it wishes to, may submit to me further briefing regarding restitution under the VWPA within twenty days of service of Judge Kaplan's opinion (and defendants shall have two weeks to respond).

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14. It will, however, be necessary to address defendants' other arguments as to why restitution is not appropriate here under the MVRA. The parties are to re-brief these issues within twenty days of Judge Kaplan's decision.

Appendix E

CONCLUSION

For the reasons discussed above, the Court should deny the Government's request for restitution under the MVRA. Should the Government then wish to pursue restitution under the discretionary Victim and Witness Protection Act, the Government shall brief the issues with respect to the VWPA within twenty days of service of Judge Kaplan's decision (and defendants shall respond within two weeks).

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Lewis A. Kaplan, 500 Pearl Street, Room 1310, and to my chambers, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Kaplan (with a courtesy copy to my chambers). Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993), *cert. denied*, 513 U.S. 822, 115 S. Ct. 86 (1994); *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir.), *cert. denied*, 506 U.S. 1038, 113 S. Ct. 825 (1992); *Small v. Secretary of Health &*

Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); *Wesolek v. Canadair Ltd.*, 838 F.2d 55,57-59 (2d Cir. 1988); *McCarthy v. Manson*, 714 F.2d 234,237-38 (2d Cir. 1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: New York, New York
December 19, 2006

/s/
Andrew J. Peck
United States Magistrate Judge

Copies to: Marcus A. Asner, Esq.
Barry A. Bohrer, Esq.
Frederick P. Hafetz, Esq.
Frank H. Wohl, Esq.
Judge Lewis A. Kaplan

APPENDIX F — STATUTES INVOLVED

18 U.S.C. § 3663

§ 3663. Order of restitution

(a)

(1)

(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(B)

(i) The court, in determining whether to order restitution under this section, shall consider—

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of--

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

* * *

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

Appendix F

18 U.S.C. § 3663A

§ 3663A. Mandatory restitution to victims of certain crimes

(a)

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

* * *

(c)

(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

* * *

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; [and]

* * *

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C. § 3664

§ 3664. Procedure for issuance and enforcement of order of restitution

* * *

(d)

(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable—

(A) provide notice to all identified victims of—

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or

hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other

matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(f)

(1)

(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

* * *

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)

(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

* * *

(l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

* * *

Appendix F

18 U.S.C. § 371

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

16 U.S.C. § 3372

§ 3372. Prohibited acts

(a) Offenses other than marking offenses

It is unlawful for any person—

* * *

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law;

Appendix F

* * *

18 U.S.C. § 545

§ 545. Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined under this title or imprisoned not more than 20 years, or both.

* * *

Appendix F

The Marine Living Resources Act (Act No. 18 of 1998)
The Republic of South Africa

Chapter 2, § 13

Permits

13. (1) No person shall exercise any right granted in terms of section 18 or perform any other activity in terms of this Act unless a permit has been issued by the Minister to such person to exercise that right or perform that activity.

(2) Any permit contemplated in subsection (1) shall—

(a) be issued for a specified period not exceeding one year;

(b) be issued subject to the conditions determined by the Minister in the permit; and

(c) be issued against the payment of any fees determined by the Minister in terms of section 25(1).

(3) The holder of a permit shall at all times have that permit available for inspection at the location where the right or activity in respect of which the permit has been issued, is exercised.

(4) A permit to exercise an existing right in terms of this Act may be refused if the conditions of a previously issued permit had not been adhered to.

Appendix F

Chapter 7, §§ 68, 69

Forfeiture orders by court

68. (1) If any person is convicted of an offence in terms of this Act, the court may, in addition to any other penalty, order that any fishing vessel, together with its gear, equipment, any fish caught unlawfully or the proceeds of sale of such fish or any perishables, and any vehicle or aircraft used or involved in the commission of that offence be forfeited to the State.

(2) If any vessel, vehicle, aircraft or other thing seized in terms of this Act, or any security or net proceeds of sale in respect thereof is not forfeited or applied in the discharge of any fine, order for costs or penalty imposed in terms of this Act, it shall be made available to the registered owner or his or her nominee or, in the absence of such persons, a person who appears to be entitled to it.

(3) If any vessel, vehicle, aircraft or other thing has been released upon the lodging of security, an order for forfeiture shall, unless the court for special reasons fixes a smaller sum, operate as an order for forfeiture of the security.

(4) If any vessel, vehicle, aircraft or other thing has been released upon the lodging of security, the court may order any person convicted of an offence in connection therewith and the owner of the vessel, vehicle, aircraft or other thing concerned, whether

or not he or she is an accused, to pay the difference between the amount lodged in respect of security and the aggregate value of the forfeited property.

Disposal of forfeited things and discharge of forfeiture orders

69. (1) Any vessel, including its gear, cargo, stores and fuel, and any vehicle or aircraft, gear, net or other equipment, explosive, fire-arm or poison ordered to be forfeited in terms of this Act shall be disposed of in such manner as the Minister may determine.

(2) The owner or any other person with real security in any property forfeited in terms of section 68, may apply to court for the release of the property in question or for the realisation of his or her security therein, as the case may be.

(3) The court may release the property contemplated in subsection (2) or order the realisation of the security therein, if the applicant proves that he or she was in no way implicated in the commission of the offence, and that he or she could not have prevented it.